

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: AUTOMOTIVE PARTS
ANTITRUST LITIGATION

MDL NO. 2311

STATUS CONFERENCE / MOTION HEARING

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Wednesday, November 13, 2013

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1	TABLE OF CONTENTS	
2		Page
3	STATUS CONFERENCE.....	15
4	<u>MOTIONS REGARDING INSTRUMENT PANEL CLUSTER</u>	
5	COLLECTIVE DEFENDANTS/DIRECT PURCHASER	
6	Motion by Mr. Cherry.....	81
7	Response by Mr. Kohn.....	91
8	Reply by Mr. Cherry.....	100
9	NIPPON/DIRECT PURCHASER	
10	Motion by Mr. Victor.....	102
11	Response by Mr. Kohn.....	106
12	Reply by Mr. Victor.....	108
13	COLLECTIVE DEFENDANTS/INDIRECT PURCHASERS	
14	Motion by Ms. Fischer.....	109
15	Response by Mr. Burns.....	124
16	Response by Mr. Williams.....	127
17	Response by Ms. Romanenko.....	128
18	Response by Mr. Cuneo.....	133
19	Reply by Ms. Fischer.....	134
20	<u>MOTIONS REGARDING HEATER CONTROL</u>	
21	COLLECTIVE DEFENDANTS/DIRECT PURCHASER	
22	Motion by Mr. Cherry.....	137
23	Response by Mr. Kohn.....	141, 145
24	Reply by Mr. Cherry.....	144
25	COLLECTIVE DEFENDANTS/INDIRECT PURCHASERS	
26	Motion by Ms. Sullivan.....	146
27	Motion by Ms. McPherson.....	155
28	Response by Mr. Williams.....	160
29	Response by Ms. Romanenko.....	165, 169
30	Reply by Ms. Sullivan.....	167
31	Reply by Ms. McPherson.....	169
32	ALPS/INDIRECT PURCHASERS	
33	Motion by Ms. Stork.....	170
34	Response by Mr. Seltzer.....	172
35	Reply by Ms. Stork.....	177

1 Detroit, Michigan

2 || Wednesday, November 13, 2013

3 at about 11:00 a.m.

4

— — —

5 (Court and Counsel present.)

6 THE CASE MANAGER: All rise.

10 You may be seated.

11 THE COURT: Good morning.

12 || ATTORNEYS PRESENT: Good morning.

13 THE COURT: It looks like you've expanded.

14 THE CASE MANAGER: It is growing, Judge.

15 THE COURT: It is growing. We have our same

16 defendants. Where are our other defendants? Just all over
17 the place? Okay.

18 Welcome back. I see that we have had -- I guess we
19 all see that we have had an increase in the number of parts
20 since we last met. I have a total of 27. Everybody count
21 that up right?

22 UNIDENTIFIED ATTORNEY: Yes.

23 THE COURT: Yes. Okay. I hate to miss one. The
24 first thing on the agenda is the motion of the United States
25 for the temporary and limited stay of certain discovery. Let

1 me, for those of you who have not been here before, tell you
2 the way we do this is we do need to use the microphone so
3 everyone can hear. Those of you in the back if you can't
4 hear please let us know. But before you speak, no matter how
5 well you think we know you, please state your name for the
6 record and then speak. All right. Now, if I had a pen we
7 could start.

8 Let me start with one thing, not to single anybody
9 out, but I would like to make this disclosure.

10 Tom Tallerico, are you here?

11 MR. TALLERICO: Yes, Your Honor.

12 THE COURT: Tom Tallerico and I -- well, before I
13 even disclose that, what are you appearing for?

14 MR. TALLERICO: I represent T.Rad, that's a
15 defendant in the radiator case and --

16 THE COURT: I'm sorry, I can't hear you, Tom.
17 Radiator --

18 MR. TALLERICO: I represent a defendant, T.Rad, and
19 they are a defendant in the radiator case and in the
20 automotive transmission fluid warmer case.

21 THE COURT: Okay. All right. Tom Tallerico has a
22 first cousin, Randall Tallerico, who is also my first cousin
23 but we are not related. We have first cousins through
24 opposite sides of a family but we are not related. We don't
25 see each other very often, the last year I don't know that we

1 have seen each other, but I do want to disclose that. If
2 anybody has any difficulty with that please let it be known?

3 (No response.)

4 THE COURT: Okay. Dave, you look like you are
5 ready to jump out of your chair?

6 MR. FINK: It is my job, Your Honor, and I'm
7 concerned that your family isn't closer.

8 THE COURT: Okay. All right. As we view this
9 motion, who is going to argue? Can I have your appearances?

10 MR. GALLAGHER: Good morning, Your Honor.

11 Paul Gallagher of the antitrust division for the Department
12 of Justice.

13 MR. FINK: Your Honor, for the -- for all of the
14 plaintiffs, Warren Burns of the -- who represents the
15 end payors will be speaking today.

16 THE COURT: For all of the plaintiffs?

17 MR. FINK: For all of the plaintiffs' groups, yes.

18 MR. DONOVAN: Good morning, Your Honor.

19 David Donovan, Wilmer, Hale, representing Denso International
20 America and Denso Corp. I will be speaking on behalf of the
21 defendants, although Mr. Iwrey is also going to address one
22 of the issues.

23 THE COURT: Why don't you put your appearance on
24 too?

25 MR. IWREY: Your Honor, Howard Iwrey, and I will be

1 addressing the later case defendant issues.

2 THE COURT: Okay. I have tried -- I have read and
3 I have copious notes on your briefs, and I get to the end and
4 then I go what are they agreeing on? I mean, it is like you
5 seem to agree with both sides, I thought the Government is
6 very cooperative that way, but first of all, as to the stay,
7 we discussed that last time and the stay itself we are going
8 for six months at a time.

9 MR. GALLAGHER: That's correct, Your Honor.

10 THE COURT: So that's clear. All right. The next
11 thing I would like to address is the scope, if you would,
12 because that's where I don't quite understand where the
13 Government fits in, and I might say to all sides I seem to
14 have a different opinion than all of you so what the heck.
15 Go ahead.

16 MR. GALLAGHER: Your Honor, after several months of
17 negotiations we were able to reach resolution on most of the
18 major issues primarily with the plaintiffs, which is where
19 the main issues were between DOJ in terms of seeking a stay.
20 The only issue that we were not able to reach complete
21 resolution on and that plaintiffs and the DOJ have agreed to
22 put off for a time, in essence, we have agreed to disagree
23 and we don't believe is an issue that needs to be in front of
24 the Court right now, is the plaintiffs wish to reserve their
25 right once the stay is lifted to come to the Court and ask

1 the Court if they can obtain discovery not from DOJ but from
2 defendants' files of statements made by any individual or
3 entity, a defendant, to the DOJ during the course of plea
4 negotiations or any sort of cooperation that these defendant
5 individuals or entities provide to the Department of Justice.

6 We have serious concerns with regard to that. We
7 have indicated that to plaintiffs, but there is no specific
8 request at this time by the plaintiffs for such materials so
9 we have agreed to a placeholder on that issue.

10 THE COURT: So when you say basically that you will
11 likely object --

12 MR. GALLAGHER: That's correct.

13 THE COURT: -- to any attempt to get this
14 information, and then you leave it to the Court, I don't like
15 that wording because it sounds like it is not an agreement,
16 but as I hear you explain it now it is not an agreement, it
17 is simply putting it off?

18 MR. GALLAGHER: That's right.

19 THE COURT: Is that right?

20 MR. GALLAGHER: That's correct. The stipulation
21 was that everyone agrees no one can get materials directly
22 from the DOJ even after the stay is lifted, but then there
23 was an exception requested by plaintiffs for this specific
24 scenario that I just set out. DOJ was concerned that having
25 that exception language in there could be viewed to be tacit

1 approval by DOJ that we recognized that they had the right,
2 the ability to request those materials from defendants when
3 we adamantly oppose them obtaining such material because
4 regardless of who the materials are obtained from, whether it
5 is DOJ or the defendants, it still has a significant and
6 direct impact on DOJ's leniency program and any cooperation
7 that we get in the future from defendants.

8 Now, again, I'm not here to go into that in detail
9 and to make an argument in detail on that, we want to reserve
10 our right to do so in the future when there are specific
11 requests and there is a context under which -- or in which we
12 can make those arguments as to why that discovery would be
13 inappropriate. So we and the plaintiffs in essence have
14 agreed to table it. They reserve their right to ask for it,
15 we reserve our rights and they acknowledge that we are likely
16 to come in and oppose that in the future. It is basically a
17 provision of fair notice to everyone about what is going to
18 happen in the future.

19 THE COURT: Okay.

20 MR. GALLAGHER: I'm sorry. That didn't directly
21 address your question, but if you have any questions on that
22 I'm happy to --

23 THE COURT: Well, the question is it is basically
24 putting it off?

25 MR. GALLAGHER: That's correct.

1 THE COURT: That's what I'm understanding now?

2 MR. GALLAGHER: That's correct.

3 THE COURT: This is document information basically?

4 MR. GALLAGHER: Yes, primarily that's my
5 understanding, we have not, and again that's why the context
6 is important when these requests are actually made, we don't
7 know specifically what plaintiffs are going to request,
8 whether it be documentary or otherwise regardless --
9 especially with regard to documentary evidence we would
10 object to that.

11 THE COURT: Okay. Right now it is until the stay
12 is lifted there will be no discovery from defendants' files
13 on matters of the DOJ --

14 MR. GALLAGHER: That's correct.

15 THE COURT: -- as matters related to the DOJ?

16 MR. GALLAGHER: And never any -- before or after
17 the stay never any discovery directly from DOJ.

18 THE COURT: Okay. I would like that reworded that
19 way if it ends up that way.

20 MR. GALLAGHER: Okay.

21 THE COURT: Objections to this, let's talk about
22 the stay period, first of all, as to the scope of discovery.
23 There is a lot of discussion about merit versus non-merit
24 depositions.

25 MR. GALLAGHER: Yes, Your Honor.

1 THE COURT: And I looked at what both sides
2 indicated and as I understand it defendants' position is
3 conduct that is or has been under investigation by the DOJ,
4 and plaintiffs' position is that the stay would apply to
5 discovery of actual or potential criminal conduct the DOJ is
6 currently investigating. It is a little tricky to me and a
7 little murky on a lot of areas.

8 MR. GALLAGHER: It is a little murky. I think
9 unfortunately it would be difficult, if not impossible, to
10 come up with a specific set -- you know, type of wording that
11 would characterize what's appropriate, and that's why the
12 parties had difficulty and now are in conflict over what
13 should be within this stayed-subject category. From the
14 DOJ's perspective we don't want to see any discovery that
15 relates to our investigations, okay, that would disclose in
16 any way either process or substance relating to what we are
17 investigating.

18 THE COURT: What if they hit on something that is
19 part of the leniency or amnesty program that they wouldn't --
20 I mean, they may not know about directly but obviously they
21 are going to be able through questioning to find out about
22 who the amnesty -- I don't know what you call it, you know,
23 or leniency person, company, is?

24 MR. GALLAGHER: Right. We have a specific tranche,
25 if you will, of the three tranches that are in the

1 stipulation. The first tranche is what discovery is
2 permitted in the initial cases, the second is for the
3 subsequent cases, and the third is informal discovery. And
4 we see that that type of discovery, whether it is settlement
5 discussions and information exchanged between defendants and
6 plaintiffs relating to settlement discussions, or information
7 that is provided by an amnesty applicant defendant to the
8 plaintiffs pursuant to their Ex Pari obligations, we view
9 that as informal discovery that would be permitted but with
10 certain constraints such as the existence of a
11 confidentiality order so the information could not be shared
12 beyond the parties who are exchanging the information, and
13 also that any time that that information was used by the
14 plaintiffs in the future in any court filings or memos,
15 pleadings, it would have to be done under seal, again, to
16 protect how far that information was disseminated.

17 THE COURT: Okay. And the response to that,
18 plaintiff?

19 MR. BURNS: Good morning, Your Honor. Warren Burns
20 again for the plaintiffs.

21 Our principal concern on the scope of the
22 stayed-subject issues here is the breadth of the language
23 that the defendants have proposed. We feel that our language
24 is narrow and precise, it affects precisely the issues that
25 were under investigation by the DOJ and therefore protects

1 the key governmental interest involved here, but we feel --

2 THE COURT: But how do you do this? It applies
3 only to actual or potential criminal conduct the DOJ is
4 currently investigating. Unless you know what they are
5 investigating you could start asking questions, I mean, and
6 then they are going to stop, and guess what, you know what
7 they are investigating. I mean, it is like I don't see
8 this -- I just don't see how you can do this.

9 MR. BURNS: There is a mutual onus in that regard
10 that applies to --

11 THE COURT: A mutual what?

12 MR. BURNS: Mutual onus to this definition, so
13 obviously if we know what the scope of the Government's
14 investigation was then we would be precluded from asking
15 those questions, but the --

16 THE COURT: So the Government would have to tell
17 you what the scope of their investigation is?

18 MR. BURNS: No, the defendants could refuse to
19 reply to a question or reply to discovery on the basis that
20 it was covered by the definition of stayed subjects in the
21 order. So in essence the mutual onus is really on the civil
22 parties. We can't ask those questions if we know they are
23 getting at that discovery.

24 THE COURT: Why can't you wait?

25 MR. BURNS: Why can't we wait until after the stay

1 is lifted?

2 THE COURT: Until after the criminal proceedings.

3 MR. BURNS: That's a subject of significant
4 negotiation between us and the Government, the two parties
5 principally interested here. I think the Government took the
6 position that with respect to the initial cases their
7 investigation was largely over, they saw fewer concerns about
8 allowing us to get into those topics because they didn't
9 think it would reach into their current and ongoing
10 investigation, and given obviously the timing and procedural
11 posture of this case we wanted to move it along as quickly as
12 we could while respecting the key governmental interest that
13 they are seeking to protect.

14 THE COURT: Defendants?

15 MR. DONOVAN: Good morning, Your Honor.

16 David Donovan.

17 Initially the Department of Justice came in with a
18 request for a stay of merits discovery and merits
19 depositions, and plaintiffs agreed with that. And as we got
20 a little further into the weeds the plaintiffs backed off,
21 and I think it is becoming increasingly clear that's exactly
22 what they want to do, they want to start getting into merits
23 discovery.

24 The problem for the defendants is, especially the
25 way they have formulated their standard, is that a witness in

1 a deposition or his lawyer would have to essentially assert
2 or concede that the subject matter about which they are
3 asking was related to either actual or potential criminal
4 conduct.

5 Now, there is a couple problems with that. Number
6 one, it might not in that defendant's view relate to criminal
7 conduct at all. They may think -- that defendant may think
8 that the subject matter was perfectly innocuous and the
9 defendant did nothing wrong, so some defendants in that
10 circumstance -- some witnesses would be testifying about the
11 merits of the Government's investigation because they thought
12 they had done nothing wrong whereas others would have to
13 assert, wait a minute, I think that maybe I did something
14 wrong so now I'm not going to answer this question. It is a
15 rabbit hole, and we will -- it will lead to endless disputes
16 at depositions about what is and what is not within the scope
17 of the stay.

18 THE COURT: Do you have any different opinion
19 regarding the initial cases' depositions?

20 MR. DONOVAN: Well, I'm speaking to the initial
21 cases' depositions. In the initial cases document discovery
22 is what gets sliced and diced a little bit.

23 THE COURT: But the document discovery has already
24 been taken care of basically except for the redaction thing
25 that we have to deal with?

1 MR. DONOVAN: In terms of the scope I think that's
2 correct, Your Honor, but document discovery of products in
3 the initial cases and defendants in the initial cases does go
4 forward. Deposition discovery that goes to the merits does
5 not go forward, whether it deals with the initial products or
6 the initial defendants or not, there is to be no depositions
7 in the initial cases that go to the merits, and what we have
8 been fighting about is trying to define what that means. I
9 think we all know what it means. What they are trying to do
10 is to create an exception so they can start to wedge into --
11 during the stay wedge into areas that the Department of
12 Justice wants to keep off limits.

13 THE COURT: Okay. One minute.

14 MR. BURNS: Just to respond briefly, Your Honor, to
15 that point. The difference here is the defendants know what
16 the Government's investigation was about, about that actual
17 or potential criminal conduct. They are in the position to
18 answer the question and to invoke their objection. The truth
19 is either under their formulation or our formulation there
20 are going to be judgment calls on their part. The difference
21 is that their formulation, this broader formulation of
22 matters under investigation -- that were under investigation
23 by the DOJ may include things that really don't touch on the
24 merits, don't touch on criminal liability, don't touch on the
25 investigation.

1 For example, the DOJ has been investigating
2 certainly their pricing activities but if we look at that as
3 a broad general hold then they can withhold information that
4 relates to their general practices that have nothing to do
5 with any type of criminal liability or the issues at stake in
6 this case.

7 THE COURT: Okay. I think that this is -- what did
8 you call it, a rabbit's hole? I agree. I do not see at all
9 how you can proceed with these depositions without getting
10 into what the Government is investigating. I mean, after all
11 that's what you want to know, that's why you really want to
12 talk to these people. So at this point the Court is going to
13 ban any merit questions. That does not mean the depositions
14 cannot go forward in terms of other things, your 30(b), your
15 corporate representatives, your -- if there is anything
16 towards class certification, if there's anything on damages.
17 You mentioned something about money but I don't see why they
18 couldn't go into anything here about damages, but anything
19 else is going to have to be held for a later date, so this is
20 not a permanent bar, I'm not saying you can never go into any
21 of these things, obviously I don't know where that's going,
22 but right now during this stay period the stay subjects are
23 everything that goes to the merits of the cases.

24 Now as to the documents and the redaction versus
25 the withholding of the document, Government?

1 MR. GALLAGHER: This is another one of those issues
2 where we are not really contesting the approach of either
3 side. We do have a strong preference for withholding of
4 those documents as opposed to redaction. Our biggest concern
5 is that regardless of how carefully a redaction process takes
6 place, if you are getting into large numbers of documents
7 redaction almost certainly will not catch everything, and we
8 are in a position where our preference is to over exclude as
9 opposed to under exclude, we don't think that that's going to
10 cause that much harm to the plaintiffs, these are things they
11 are going to get ultimately down the road anyway, and our
12 preference then would be for the defendants to withhold
13 any --

14 THE COURT: As I understand it, these are all Bates
15 stamped materials, is this because this is all material that
16 has been given to the Government and it was Bates stamped at
17 that time or --

18 MR. GALLAGHER: I will let the defendants speak to
19 that because --

20 THE COURT: Because I didn't understand when it was
21 Bates stamped.

22 MR. GALLAGHER: There may be Bates stamping in
23 different ways depending on what they are doing with the
24 documents.

25 THE COURT: Okay. Plaintiff?

1 MR. BURNS: Your Honor, plaintiffs' preference is
2 for redaction. Obviously it is laid out in our position
3 statement. Our concern again is over scope, we worry about a
4 document that is 85 pages long dealing with pricing issues
5 and has one reference on one page to another competitor or to
6 another part. Perhaps there is not a -- perhaps we don't
7 have to look at this as a binary choice because it would
8 strike me in that case redaction would be appropriate and the
9 defendants could redact and log, but certainly there are
10 going to be situations where we understand there would be
11 significant redactions in a document. So if the Court is
12 inclined to permit the defendants to withhold then we would
13 simply ask for a Folsom log so that we can monitor what is
14 being withheld, and it is relevant to our discovery going
15 forward and our prosecution of the case. We are mindful of
16 the fact that at least one defendant in this case has
17 admitted in its plea agreement to destroying documents, these
18 are people who have pled guilty and the burden on them
19 frankly is one that should be expected. We want to move the
20 case forward and that's why we would like to see what is
21 being withheld and be able to challenge it if we can.

22 THE COURT: Okay. Defendant, Mr. Donovan?

23 MR. DONOVAN: This one frankly has us scratching
24 our heads a little bit. We have collectively produced in the
25 wire harness case more than 12 million pages of documents.

1 According to defendants -- plaintiffs' discovery responses
2 last week they can't even answer most of our questions
3 because they are still reviewing the documents we produced a
4 year ago. There's not going to be any merits deposition
5 during the stay so there's no use they can make of these
6 documents during the stay other than to just look at them.
7 And by the time we get done with the redaction process they
8 are proposing and the logging process they are proposing and
9 presumably the meet and confers that we will then have to
10 engage in about whether the redactions are okay or not the
11 stay will likely be over and the entire thing would be
12 entirely moot and a waste of time.

13 In the meantime --

14 THE COURT: Okay. Start -- go back a little bit
15 though.

16 MR. DONOVAN: Sure.

17 THE COURT: I want to know about the Bates stamping
18 because they are interested in documents maybe disappearing
19 or being lost, et cetera.

20 MR. DONOVAN: Sure. What we proposed from the
21 get-go is any document withheld would be identified by a
22 Bates number. When we do our document reviews, Your Honor,
23 documents get numbered, that's the first thing you can do so
24 you can keep track of them. If you don't number them right
25 away you are talking about millions of pages of paper. You

1 have to number them to keep track of them. Any document
2 under our proposal that is withheld for this reason because
3 it contains a reference to other products not in the initial
4 cases or other competitors not in the initial cases would be
5 identified by a Bates number and we would give them a list of
6 the Bates numbers, that way when the stay is lifted and we
7 produce all of the documents that were withheld for this
8 reason they can compare the documents that they are getting
9 with the lists of Bates numbers and see they have got them or
10 see there is some document that was withheld that has now not
11 been produced and they can inquire why. I think it is pretty
12 straightforward really.

13 The logistical nightmare of doing what they suggest
14 really can't underestimate -- or overstated, I always get that
15 wrong. There are multiple copies of many of these documents,
16 especially e-mails, not all of which are entirely identical.
17 So what they are asking us to do is not only -- when we
18 identify a document that contains a reference to another
19 product or another competitor, redact that reference, but
20 then continue reading the entire document to redact all the
21 references. So when you have got 6, 8, 15 copies of any
22 given document you have got to make sure that you have
23 identified all the duplicates, to the extent they are not
24 duplicates identify what is different, review every page, as
25 the Department of Justice said, very carefully to make sure

1 you have redacted it in an identical way, and then I guess
2 log it with all of the steps of the logging process they
3 propose.

4 It is unlikely in a case of this size with this
5 many pieces of paper that you are going to do it consistently
6 every time, and so you are going to have some versions of a
7 document that get produced that doesn't have all of the
8 redactions of another version of the document so the cat's
9 out of the bag in that event. That's the concern I think the
10 Department of Justice appropriately raises, you are just not
11 going to get it right, there are too many pieces of paper, so
12 withholding is the only way to go.

13 There is more than enough paper going to be
14 produced in this case, there already has been more than
15 enough paper produced in this case to keep the plaintiffs
16 very, very busy reviewing paper until well after the stay is
17 over. Withholding whatever tiny percentage falls within the
18 scope of the stayed areas is no burden on anyone and
19 requiring us to redact and log all of those pieces of paper
20 is an enormous burden, extraordinary expensive and ultimately
21 I think a complete waste of time.

22 In the alternative, they are suggesting that if we
23 are allowed to withhold that we produce an even more detailed
24 log with respect to every document that is withheld with the
25 date, the author, the recipients, the custodians, the subject

1 matter, the Bates numbers and the specific reason that the
2 document is being withheld. Again, it is entirely pointless.
3 By the time we get done providing it the stay will likely be
4 over in which case all of that expense and all of that effort
5 is completely wasted. And the only advantage to the process
6 they are proposing is if during the course of the stay we are
7 going to be in here arguing about the log and whether the log
8 is Folsom enough or whether the subject matter has been
9 identified clearly enough or whether the document really
10 should or should not have been withheld, all of which will
11 get resolved just about the time the stay is over and they
12 get the documents anyway.

13 So we are just asking that we not be put to a
14 burden that is entirely unnecessary, very expensive, unlikely
15 to be successful, and ultimately to be no value to anybody.

16 THE COURT: Out of curiosity, when you have these
17 documents that you turned over, like you said, the 12 million
18 pages.

19 MR. DONOVAN: Collectively, not just ours.

20 THE COURT: Good. You all shared 12 million pages.
21 You know, back in the day when I did this it was manual, now
22 I know there are computer programs that do that. Do you, in
23 fact, use computer programs, I'm just curious, or does
24 somebody read all of these documents?

25 MR. DONOVAN: Those documents are all reviewed.

1 There may come a point where we talk about predictive coding,
2 but to this point -- and I can't speak for everyone here.

3 THE COURT: Just for yourself. I'm just curious.

4 MR. DONOVAN: But these are the documents that were
5 produced in response to the Department of Justice Grand Jury
6 subpoenas, and those documents have all been eyeballed by
7 somebody. And, of course, a lot of those documents are in
8 Japanese -- in fact, the vast majority are in Japanese. They
9 have been reviewed by Japanese-speaking attorneys and legal
10 assistants and the like.

11 THE COURT: I was just curious as to how that
12 works.

13 MR. DONOVAN: It is quite an undertaking.

14 THE COURT: Mr. Burns?

15 MR. BURNS: Just briefly, Your Honor. I mean, we
16 have heard quite a parade of burdensome horribles, and I'm
17 not insensitive to those concerns but --

18 THE COURT: Have you read the 12 million documents?

19 MR. BURNS: I have not personally read those
20 12 million, Your Honor, but actually that brings up a point.
21 The 12 million documents are not the ones that we are arguing
22 about now, we are talking about other documents that may be
23 produced in response to discovery. We have heard counsel
24 represent that it is a tiny percentage of whatever they are
25 going to produce. We know that they are reviewing each of

1 those documents for responsiveness and for this redaction and
2 to redact if necessary or to withdraw if necessary. So it is
3 hard for me -- I'm scratching my head a little bit to
4 appreciate this significant and appreciable burden that
5 arises after they have done the review and know that there is
6 something in there they don't want to turn over or redact.

7 THE COURT: What are you going to do with that
8 information?

9 MR. BURNS: Well, Your Honor, if we are given a
10 Folsom log then we would review the log like we would a
11 privilege log and determine if there were any documents in
12 there that we wanted to ask further questions on. My
13 experience in many cases is that those questions are fairly
14 limited. We are not going to -- I can't imagine a situation
15 where we would march down a 100-page list or a 100-page log
16 and go document by document, but it provides us some security
17 that they are abiding by appropriate control mechanisms and
18 doing these redactions or withholdings and that we have the
19 ability to challenge it if necessary.

20 THE COURT: Okay. In looking at this I think this
21 is another rabbit's hole and that these documents should be
22 withheld. I think you having a log with a Bates number is
23 sufficient. It will give you enough information to be
24 assured that at a later time you get those particular
25 documents or some reason why you shouldn't get those

1 particular documents, and I think there is plenty to be done
2 here that this does not delay this litigation, so that's my
3 ruling.

4 Okay. What other things on that order did I not
5 cover?

6 MR. DONOVAN: Mr. Iwrey is going to address an
7 issue with respect to the later cases, but there is one more
8 issue for the initial cases that I would like Your Honor to
9 address.

10 THE COURT: Okay.

11 MR. DONOVAN: We proposed that as we know there are
12 no merits depositions during the initial stay. There will
13 likely, however, be some witnesses who have factual
14 information not subject to the stay but who also have factual
15 information that is subject to the stay, and we don't think
16 it makes any sense to have those witnesses be deposed more
17 than once, once during the stay with respect to the things
18 that are within the limits and then again after the stay with
19 respect to things that are outside of the limits. So what we
20 propose is that if either side notices up a deposition of a
21 witness who that party's counsel believes to have information
22 covered by the stay and about which that witness, of course,
23 won't be able to testify, that if the other side nonetheless
24 decides to go forward with that deposition during the stay
25 that any redeposition of that witness after the stay they

1 have to pay the costs and expenses associated with that
2 second deposition.

3 We are not trying to impose any additional costs on
4 anybody, we are just asking that the parties be smart about
5 what they do during the stay so as not to impose needless
6 expense on either side. If these witnesses were all in
7 Michigan and we were all in Michigan and conducting
8 depositions in Michigan it wouldn't be such a big deal, but
9 most of these witnesses are outside of the United States, and
10 to require dozens of lawyers to travel outside of the United
11 States to take a deposition of a witness about something
12 reasonably non-controversial during the stay and then make
13 everybody schlep out there again after the stay is over to do
14 it again now that the stay is over just doesn't make any
15 sense to us.

16 We think there's plenty of witnesses -- we expect
17 there will be plenty of witnesses if the parties want to go
18 forward with depositions during the stay who can be deposed
19 who won't raise this issue at all, and for those witnesses
20 who do have information about other products or other
21 competitors about which the witness cannot be deposed during
22 the stay we suggest we just put those depositions off but
23 that if somebody wants to go forward anyway and they really
24 want to take that witness's deposition now then they should
25 have to pay the expense incurred in redepositing the witness.

1 THE COURT: Let me ask you about the list that I
2 received of the individual defendants who are being released
3 from prison. Was -- are they going back to their homelands,
4 a number of them, immediately or is there something to do
5 with being able to take depositions before they leave the
6 United States?

7 MR. DONOVAN: Mr. Cherry has been addressing this
8 issue on behalf of our clients, and I will let him address
9 that issue.

10 THE COURT: Okay. Your appearance, Mr. Cherry?

11 MR. CHERRY: Yes, Your Honor. I'm Steve Cherry
12 with the law firm Wilmer, Hale, and I represent Denso.

13 With respect to our own people, they will be
14 returning to Japan and -- but we have worked out an agreement
15 with the plaintiffs, we haven't executed the stipulation yet
16 but we are in agreement on the terms that they will agree to
17 come to one of various locations at their choice that has
18 been worked out for a deposition at the appropriate time.

19 THE COURT: So they are still in the United States
20 or once they leave the United States are they able to get
21 back into the United States?

22 MR. CHERRY: Oh, yes, yes. As part of the plea
23 agreements the antitrust division -- there is an MOU process
24 with Homeland Security and ICE, and the individuals are able
25 to come and go from the U.S., so they will be able to come.

1 THE COURT: All right. So the Government has
2 agreed on that?

3 MR. CHERRY: They have agreed to do that pursuant
4 to the terms.

5 THE COURT: That answers a big question.

6 MR. SQUERI: Your Honor, Stephen Squeri on behalf
7 of Yazaki North America and Yazaki Corporation.

8 If I could address that question with respect to
9 certain individuals from Yazaki that have been sentenced to
10 serve time in prison.

11 Your Honor, we have, in fact, entered into a
12 stipulation and agreement with plaintiffs that would call for
13 those individuals in the wire harness cases to return to the
14 United States in order to sit for depositions. That
15 stipulation was filed with the Court back in early August as
16 a result of some pretty extensive negotiations between us and
17 plaintiffs. Each of those individuals have agreed to do so.

18 As in the case of Mr. Cherry's -- the employees of
19 Mr. Cherry's client, Denso, each of the Yazaki individuals
20 were provided immigration waivers that allow them to continue
21 to travel into the United States, they will have to go to the
22 U.S. Embassy.

23 THE COURT: Okay. That's what I didn't know from
24 reading that stipulation is were they remaining here somehow
25 or were they going back and then how could they get back in

1 the country, but that answers the question so that's good.

2 Thank you.

3 All right. Mr. Iwrey?

4 MR. BURNS: Your Honor, may I respond just on the
5 multiple deposition point briefly?

6 THE COURT: Yes.

7 MR. BURNS: Again, our issue comes down to scope on
8 this. It is entirely one-sided and the defendants --
9 particularly with respect to 30(b) (6) witnesses the
10 defendants are going to choose the deponent and we are going
11 to be, in essence, stuck with the choice of whether to go
12 forward with that deposition, which won't be stayed, and be
13 subjected potentially to paying expenses and attorney fees on
14 the back end. We don't think that's fair and we don't think
15 it is going to help us sufficiently move this case forward.

16 THE COURT: All right. Does your comments,
17 Mr. Iwrey, have to do anything with this?

18 MR. IWREY: No.

19 THE COURT: No. Okay. Let me just rule on this.
20 I think that it's very logical to say that you may depose the
21 witness now, you may depose the witness later, but if you
22 depose the witness now and you want to do it later then you
23 would have to pay the cost and expense. However, I think
24 there is an exception for 30(b) (6) witnesses because I think
25 that there is a need for -- of a 30(b) (6) witness now, not

1 later. And so if the witness presented by the defendants is
2 a 30(b) (6) witness and also has factual information that you
3 cannot go into now, that witness may be deposed twice with
4 everybody bearing their own costs, but if it is a
5 non-30(b) (6) witness then you have to make a choice of when
6 you want to depose them or run the risk of paying the costs.

7 Okay.

8 MR. BURNS: Thank you, Your Honor.

9 THE COURT: Mr. Iwrey?

10 MR. IWREY: Your Honor, Howard Iwrey on behalf of
11 the later-case defendants. Given the newcomers to this case
12 we may have additional ones if they care to weigh in.

13 I think that you addressed the issue with respect
14 to the later cases in terms of document production and other
15 discovery in your ruling on staying the merits of the case,
16 so this may be very brief. I think you had it right --

17 THE COURT: It does apply to the later cases
18 obviously.

19 MR. IWREY: Okay. Thank you. The only particular
20 issue that I would like to address then is the wording of the
21 plaintiffs' proposed order which said that they want a stay
22 of discovery that inquires into, and the words inquire into
23 are important, because that would only stay discovery for
24 instance if they took a -- if they issued a document request
25 all communications with competitors. That is too narrow

1 because it would allow plaintiffs to circumvent the stay of
2 merits discovery simply by asking for all documents that
3 refer or relate to pricing, all documents that refer or
4 relate to RFQs, et cetera, because that could encompass the
5 stayed subjects. So I think our language that says discovery
6 relating to or inquiring into the stayed subjects would cover
7 that.

8 And I think Your Honor had it exactly right when
9 you said why can't you wait? We as defendants want the
10 ability to review the documents only one time and produce it
11 at that time, and as counsel pointed out it may be a very
12 short delay anyway.

13 THE COURT: All right. I'm going to have you work
14 on another order together. I think you know the substance of
15 what I ordered and I think that you could work this out.

16 MR. IWREY: I think we can.

17 MR. BURNS: Thank you, Your Honor.

18 THE COURT: If not, please call me and I will have
19 you come in soon, not wait until the next status conference,
20 but I think you can do that.

21 MR. IWREY: Thank you, Your Honor.

22 THE COURT: Okay.

23 MR. BURNS: Thank you, Your Honor.

24 THE COURT: Now, there is one other thing on the
25 depositions, and that's -- well, let me look at the agenda,

1 maybe I'm ahead of myself here. I'm thinking of the Ford
2 Motor Company's request for the three additional hours.
3 There's quite a bit on the agenda on Ford later but let's
4 talk about this.

5 MR. SQUERI: Your Honor, Stephen Squeri on behalf
6 of Yazaki Corporation and Yazaki North America.

7 THE COURT: Could you spell your last name for me,
8 please?

9 MR. SQUERI: Yes, S-Q-U-E-R-I.

10 THE COURT: Okay. Mr. Squeri?

11 MR. SQUERI: If I could just start, Your Honor,
12 with providing some background with respect to the entering
13 of the stipulations and agreements. This goes back to the
14 early part of this year when plaintiffs first raised the
15 issue of taking the depositions of the individuals who are
16 incarcerated. It was raised first in the January, February
17 time period. We proceeded for Yazaki at that point in March,
18 actually, to tell plaintiffs that we would be willing to
19 support some type of an arrangement that would have the
20 individuals returning to the United States, which we did. We
21 had meetings with each of the individuals, we met with them
22 on two occasions, Your Honor, first to get them to agree in
23 principle to the concept, and then we met with them again
24 after we had some extended negotiation with the plaintiffs in
25 order to arrive at an appropriate stipulation.

1 The stipulation that we entered into is wholly
2 consistent with the initial discovery plan that was entered
3 in the case. It calls for the deposition of these
4 individuals to last a total of 12 hours because they do not
5 speak English, over a period of -- and it would take place
6 over a period of two days, which is precisely what the
7 initial discovery plan that was signed by the Court calls
8 for.

9 The one thing that we did do that was an exception,
10 and this was part of the negotiated deal between us and the
11 individuals and plaintiffs' counsel, was to provide that the
12 individuals would return to the United States on appropriate
13 notice and to have their depositions taken at certain
14 designated cities that the parties agreed would be
15 appropriate places for these depositions.

16 We signed those agreements, it was by June that we
17 reached the agreement in principle. Those agreements -- the
18 stipulation and agreement was signed during the course of the
19 month of August -- of July, excuse me, we provided it to
20 plaintiffs' counsel who filed it in August, and at that time
21 it was simply made part of the Court's record. It was an
22 agreement that was reached in good faith, we think it is
23 fair, and everyone including the individuals were willing to
24 assume the undertaking that was being -- that is set forth in
25 those stipulations.

1 Ford filed a response or objection to that -- that
2 stipulation in August shortly after it was placed on file,
3 and it was sometime after Ford had filed its own separate
4 lawsuit against Fujikura, it was our position that we should
5 not be rewriting that stipulation, certainly not at this
6 point in time, that there was no basis for it, and we also
7 didn't think there was any basis for Ford to object to an
8 agreement that was reached between Yazaki, Yazaki
9 Corporation, and these individuals and the plaintiffs who had
10 sued our client. I mean, they are the parties who we entered
11 into this agreement with.

12 It is certainly our position that any depositions
13 or any discovery that takes place in the case ought to be
14 conducted in coordination. We have no objection to Ford
15 sitting in on the depositions, participating in the
16 depositions, and I know that later on the agenda it would
17 be -- is the question of exactly what Ford's status is in the
18 case, but we certainly not only agree with or are willing to
19 agree to but we support the concept of coordinated discovery.
20 What we are opposing is the concept certainly at this point
21 in time of trying to rewrite the stipulation, rewrite the --

22 THE COURT: You don't want to extend the 12 hours?

23 MR. SQUERI: We don't want to extend the 12 hours,
24 we don't think we are at a point where that's appropriate,
25 and a large part of the reason, Your Honor, beyond Ford's

1 standing to object is simply the fact that these individuals,
2 while they have been employed by Yazaki, and this is apparent
3 from the plea agreements, worked solely on Honda, Toyota and
4 one worked on -- a little bit on Subaru business but there is
5 no indication that they had anything to do with Ford
6 business, so we feel that under the circumstances there would
7 be no justification at this point anyway to increase the time
8 of the depositions because of Ford's later-filed lawsuit.

9 THE COURT: Okay. Ford?

10 MR. TORRES: Good morning, Your Honor.

11 Hector Torres for Kasowitz, Benson, Torres and Friedman for
12 Ford Motor Company.

13 Your Honor, briefly just in terms of the background
14 of the Ford action, the Ford action was filed on July 16th of
15 this year, and at the time it was filed this stipulation was
16 being circulated among the parties that were then in the
17 case. On the 6th of August the action was assigned to Your
18 Honor as a companion case, and pursuant to the initial
19 case-management order in this case Section 1 provides that
20 any subsequently-filed direct-purchaser action concerning
21 wire harness systems shall be consolidated for pretrial
22 purposes.

23 The master document in the case now reflects that
24 Ford is a plaintiff in its action and as part of the MDL.
25 Yazaki has taken the position that with respect to this

1 stipulation we had no right to participate in the negotiation
2 of the stipulation. True, it had been in negotiation but it
3 was submitted -- the first time we learned about the
4 stipulation was when it was filed by the Court. Now we had
5 been -- we had filed our action more than a month at that
6 point and never had any idea that the stipulation was being
7 negotiated, and the problem with the stipulation as currently
8 drafted is that it is simply we believe unfair as to Ford
9 because it has absolutely no provision for Ford's right to
10 take -- to participate in this deposition of these five
11 Yazaki employees who are critical witnesses in these cases.
12 They have pled guilty to price fixing and bid rigging during
13 the ten-year period of the conspiracy that is alleged by Ford
14 in its complaint. Yazaki is a major supplier of wire
15 harnesses to Ford. The allegations of the complaint clearly
16 set forth while it is a claim against Fujikura that Yazaki
17 was a co-conspirator, and there is nothing unusual in those
18 allegations because they are essentially taken from the
19 guilty plea from Yazaki and the individuals.

20 With respect to the argument that because they are
21 Honda and Toyota and therefore Ford should have no interest
22 in them, that's precisely backwards, Your Honor, because this
23 was under the plea agreement a conspiracy to allocate the
24 business of the OEMs around the world, and Ford obviously as
25 alleged in our complaint was allocated to Yazaki among others

1 and part of the deal was that Fujikura would not go after the
2 Ford business. So the notion that we have to establish some
3 kind of relevancy under those facts we believe is not
4 sustainable. We clearly have a right to participate in the
5 discovery of these witnesses.

6 THE COURT: You're asking for three hours?

7 MR. TORRES: Your Honor, when we were attempting to
8 negotiate initially we went to the plaintiffs and the
9 plaintiffs -- we requested that with respect to the initial
10 order that was set forth that we have the right to
11 participate and cooperate with them but have a right to take
12 part of that time for Ford to examine the witnesses. The
13 plaintiffs' counsel indicated that we would prefer that you
14 go to Yazaki and seek additional time from Yazaki. We went
15 to Yazaki, we requested the additional time, Yazaki refused
16 to grant the additional time.

17 At this point what our motion is and it is simply a
18 motion that essentially recognizes Ford's right to
19 participate in the depositions, we are not seeking the
20 additional three hours, all we are seeking is the right --
21 that we have a right to participate in the depositions in
22 coordination and in cooperation with the plaintiffs.

23 THE COURT: Okay.

24 MR. TORRES: Thank you, Your Honor.

25 MR. SQUERI: Your Honor, if I could address a few

1 of the issues that were raised by Ford's counsel. I mean,
2 first of all, to be clear again the parties concluded their
3 negotiations and actually began signing the stipulation prior
4 to the filing of Ford's lawsuit. And, secondly, it is still
5 a fundamental fact that there is no lawsuit involving us and
6 Ford so I don't think we had any obligation at that point in
7 time particularly given the recent filing of that lawsuit to
8 involve Ford in a negotiation. But I think, you know, more
9 importantly, what Ford is asking the Court essentially to do
10 is not just to ignore the terms of the stipulation that was
11 agreed to at arm's length between the parties but Ford is
12 asking the Court to not apply the terms of the initial
13 discovery plan that was signed in the case in that it -- and
14 that plan calls for 6 -- excuse me, 12 hours of depositions
15 for individuals who do not speak English unless someone is
16 able to come in and they have the burden of doing so under
17 that plan to show need. We --

18 THE COURT: All right. But as I understand it now,
19 I thought this was more a timing issue, but as I understand
20 it now Ford wants to participate in the deposition. We
21 aren't looking for extending the hours that you are speaking
22 of, it is participation, correct?

23 MR. SQUERI: Your Honor, we do not object to their
24 participation in the deposition. It is the extension of the
25 hours that we disagree with --

1 THE COURT: Okay.

2 MR. SQUERI: -- because we don't feel that they
3 have shown appropriate cause at this point in time.

4 THE COURT: All right. Thank you.

5 MR. FINK: Your Honor, Randall Weill will speak on
6 behalf of the -- the plaintiffs -- direct-purchaser
7 plaintiffs and others. I should note -- I'm sorry.
8 David Fink, for the record.

9 I should note that Steve Kanner and Gene Spector,
10 who have been at all the previous proceedings, are both
11 slightly ill today so rather than spread that illness among
12 our friends they are not here. Fortunately we have enough
13 counsel on the plaintiffs' side that others can speak to it.

14 THE COURT: I don't think it is a problem.

15 MR. WEILL: Good morning, Your Honor.

16 Randall Weill for the direct purchasers in this case, and I
17 will let the indirects speak if they would like to add to my
18 remarks.

19 With respect to Ford, the plaintiffs are happy to
20 cooperate and coordinate our efforts but I think it is
21 helpful to clarify a couple of things that might touch on the
22 question of Ford's status in the litigation to help
23 understand where we sit with this deposition stipulation.

1 separate classes, they have three classes, they have a number
2 of very complex issues that they have to address in the
3 context of this litigation. We have been working on this for
4 three years. We have been told endlessly how many millions
5 of pages of documents that we have provided with, but in the
6 context of this deposition we in the initial discovery plan
7 agreed with the defendants that we have sued, seven on behalf
8 of direct purchasers, that there would be 12 hours of
9 deposition time allotted for people who wouldn't be able to
10 testify in English, no more than seven in one day, leaving
11 five for the next day, and it doesn't have to be contiguous.

12 But the concern that we have where the three
13 plaintiff groups are working carefully to try to coordinate
14 their efforts at these depositions is that we have to
15 represent these classes, and Ford and I understand and
16 respect Ford's statement now that they are not looking for
17 any additional time, but Ford's request at least initially
18 that they be allotted time for their case impinges on our
19 ability to represent and pursue discovery on behalf of these
20 classes. Ford is not a class case, it has sued one
21 defendant. Ford is represented by separate counsel, and
22 there's some confusion about its status I think with respect
23 to --

24 THE COURT: We are going to talk about that later,
25 but let's stick to the depositions right now.

1 MR. WEILL: With that background in mind, our very
2 deep concern, Your Honor, is we have an absolute need to use
3 the time that we have carefully set aside in the initial
4 discovery plan that's been in existence for more than a year,
5 and then with respect to these particular deponents who are
6 being released from jail we are trying to preserve their
7 testimony by being able to bring them back to the
8 United States and use the time that we have agreed in our
9 initial discovery plan.

10 Now, Ford may and I suspect will have its own
11 case-management orders for its case. We would ask the Court
12 not to interfere with the case-management orders and initial
13 discovery plan and subsequent discovery plans that the class
14 cases have pursued carefully with the defendants.

15 THE COURT: All right. What I see here and I see
16 that this is going to be happening, we have a lot of things
17 that are going to be interfering with the individual cases
18 because we have companion cases coming in, we have tagalongs,
19 we have all of these things, and I don't think it would serve
20 anybody to be on vastly different discovery schedules or do
21 things separately just because you want to preserve your
22 place, your right, your whatever.

23 I think that given the size and nature of this case
24 that cooperation is critical, and I believe that Ford Motor's
25 counsel could cooperate with the plaintiffs' counsel, the

1 interim lead counsel in the deposition. You could get
2 together beforehand and decide how much -- what questions you
3 want to ask or what you might need specifically. I just have
4 trust that you can do this.

5 So Ford is not asking for more time, I think it
6 makes very good sense to allow Ford to participate in the
7 depositions of these Japanese individuals, and you know I'm
8 happy that they agreed to come back here because it is so
9 difficult, we get into those foreign depositions and it
10 always takes forever.

11 So at this point I'm going to allow Ford to
12 participate in the deposition. No allocation of time, you
13 will have to work out how you are going to do that amongst
14 counsel. Okay. That takes care of that.

15 MR. TORRES: Thank you, Your Honor.

16 THE COURT: All right. Status. Pending cases.
17 Wire harness, who is going speak to that? Mr. Iwrey? Oh,
18 he's just running away. I thought you were going to speak.

19 MR. FINK: David Fink.

20 Your Honor, initially on the discovery issue,
21 Steve Williams will be speaking for the plaintiffs. That's
22 the first point I think where the Court -- where there's any
23 issues to present to the Court. Okay. There's no issues on
24 the pleadings so the first issue relates to initial
25 disclosure obligations of certain defendants. And if not

1 Mr. Williams then Greg Hansel will speak.

2 MR. HANSEL: May it please the Court, good morning,
3 Your Honor. Greg Hansel for the direct-purchaser plaintiffs.

4 THE COURT: Good morning.

5 MR. HANSEL: Early in the case the Court entered
6 the initial discovery plan, as the Court is aware, which is
7 Document 201, and as a part of that plan in the wire harness
8 case the defendants who had pled guilty agreed to produce to
9 the plaintiffs the documents that they had produced to the
10 Department of Justice. Related to that agreement was
11 paragraph 4 of the initial discovery plan which states that
12 those defendants' initial disclosure obligations under
13 Rule 26 would be deferred to be then discussed in a
14 meet-and-confer process after the Court had ruled on the
15 motions to dismiss in the wire harness case.

16 After the Court ruled on the motions to dismiss
17 last summer the plaintiffs initiated a meet-and-confer
18 process on the Rule 26 obligations of the guilty-plea
19 defendants, and that process is still underway. We have not
20 reached a resolution yet but we are hopeful that we'll be
21 able to meet and confer with them in detail and either reach
22 a resolution or if not we will come to the Court at that
23 time, but that process is ongoing and I simply wanted to
24 report that to the Court.

25 THE COURT: Okay. So this is relating just to your

1 Rule 26 and how you are going to proceed, the timing, so we
2 can develop some other orders in terms of discovery, right?

3 MR. HANSEL: That's correct, Your Honor, and that
4 segues into a second related issue. The Court had entered
5 the initial discovery plan back in July of 2012, and now the
6 parties are in discussions regarding a second discovery plan
7 which you could call the supplemental discovery plan. In
8 that regard the defendants have made a proposal, the
9 plaintiffs have reviewed it. In the view of the plaintiffs
10 it was premature to sit down with the defendants about a new
11 discovery plan until we knew what the resolution of the
12 Department of Justice's motion for a stay of discovery would
13 be. That is a threshold issue that has a significant effect
14 on discovery, and the plaintiffs felt we couldn't really plan
15 a schedule for the rest of the case until we knew to what
16 extent the DOJ's partial and temporary stay would affect
17 discovery.

18 I think after today we have a much better sense of
19 that, it is still not completely resolved, but the Court has
20 encouraged the parties to resolve the remaining issues by
21 agreement and I'm sure that will happen with the guidance
22 that the Court has given today.

23 I will say the plaintiffs and the defendants have
24 had some difficulty agreeing on the logistics and details of
25 the discussions regarding these discovery plans, both the

1 Rule 26 and the supplemental discovery plan. There are also
2 other discovery issues that are out there that need to be
3 discussed including the plaintiffs' objection to the
4 defendants' discovery -- written discovery, the defendants'
5 objections to the plaintiffs' written discovery, and the
6 production of transactional data by the defendants, which is
7 a critical matter for the plaintiffs' analysis on the class
8 certification issues coming down the road. So there are
9 really five major areas of discovery that are now the subject
10 of a meet-and-confer process. Some of those are defendant
11 specific such as when a defendant made unique objections to
12 plaintiffs' written discovery requests to that defendant. In
13 other cases there are some common issues such as the
14 supplemental discovery plan, that's more of a common issue.

15 So we are trying to -- we are grappling with what
16 is the best way to -- logically to negotiate all of this.
17 Does it make sense to gather everyone in a room with a table
18 about the size of this room or does it make more sense to
19 work things out between individual plaintiffs and defendants
20 or individual classes and defendants where there are unique
21 objections to discovery requests.

22 So we are working with defendants to try to reach
23 some kind of agreement on those discovery issues, and if we
24 are unable to agree in due course I'm sure we will be back in
25 front of Your Honor.

1 THE COURT: I'm interested in the discovery issues,
2 I say this for all cases and classes, et cetera, because I'm
3 not -- I don't have a feeling yet as to the time involved in
4 these discovery issues and whether these discovery issues are
5 things that could go to the magistrate judge realizing, of
6 course, the magistrate judge has a full document and this is
7 just one case to her so, you know, or whether the Court
8 should keep all of the discovery matters, so we are trying to
9 see. We at times get overwhelmed because of the volume of
10 work involved in this. Molly has done a marvelous job with
11 me, but the two of us can plod along, but it may be that I
12 have to consider another source like the magistrate judge.

13 So I'm going to be interested in what these
14 discovery objections or motions might look like because I
15 think I need to wait to see that so then I can decide how I
16 want to handle it. So I want you to know right now -- I know
17 somebody filed an objection but not a motion to discovery, I
18 think, and you mentioned that. I'm not doing anything on
19 discovery so I don't -- if there is anything out there that I
20 should be working on you better let me know because I don't
21 know of any discovery yet that I need to work on.

22 MR. HANSEL: We will let you know, Your Honor.

23 THE COURT: I know you will.

24 MR. HANSEL: Thank you.

25 THE COURT: Okay.

1 MR. SQUERI: Yes, Your Honor. Steven Squeri again
2 on behalf of Yazaki Corporation and Yazaki North America,
3 and I'm also speaking on behalf of the other defendants in
4 the wire harness cases regarding this issue.

5 First of all, with respect to the issues that came
6 up regarding the initial disclosures, just to be clear, the
7 first request for those came to us on September 21st from
8 plaintiffs, and we have been trying to set a date to meet
9 since that time, we have proposed ten dates and none of those
10 were taken and no alternatives were provided. We now have
11 plaintiffs suggesting meetings the week of November 18th for
12 the discussion of our discovery responses. The defendants
13 have indicated they are available the later part of that week
14 and we are happy to do that because I think it is important
15 for us to move forward with these things.

16 Regarding the supplemental discovery plan, Your
17 Honor, I think one of things that is important for the
18 defendants to communicate today is the fact that we want very
19 much to move that process forward. At the last conference
20 before the Court I believe it was counsel for Sumitomo
21 mentioned the fact that we felt there was a need for a
22 supplemental discovery plan, and that's because there are a
23 number of issues that were not addressed in the initial
24 discovery plan that need to be addressed at that time.

25 Hence what defendants did -- our eight defendant

1 groups together, we collectively drafted a proposed discovery
2 plan that we sent to the plaintiffs, the plaintiffs' lead and
3 liaison counsel back on September 19th. Since that time we
4 have been trying to schedule a meeting in order to discuss
5 that. We have -- also we proposed ten separate dates, no
6 dates were taken. At the same time plaintiffs did not
7 propose any alternative dates. As counsel for plaintiffs
8 recently pointed out they -- plaintiffs took the position
9 that they couldn't discuss the discovery plan until after the
10 Court ruled on the DOJ stay issues. We didn't feel that was
11 necessary or at least we felt we could make substantial
12 progress.

13 As it stands right now the parties have agreed to
14 put things off until after this hearing, which we indicated
15 we were ultimately fine with -- actually we had no choice
16 because none of our meeting dates were accepted but, Your
17 Honor, we believe that when it comes to the discovery plan we
18 believe that it is critical that the parties establish a high
19 priority for getting that done.

20 THE COURT: So you are going to meet the week of
21 November 18, that's next week?

22 MR. SQUERI: That's -- plaintiffs proposed the week
23 of November 18th, we wrote back with a letter indicating that
24 we could meet on the 21st and 22nd. We have not heard back
25 from plaintiffs as to whether or not they are ready to go

1 forward on those dates, but we --

2 THE COURT: So we need a date. Wait a minute, stop
3 because now I will be secretary. I will put that hat on. We
4 need a date. I hear -- you are shaking your head so come on
5 up and let us know.

6 MR. WILLIAMS: Thank you, Your Honor.

7 Steve Williams for the end-payor plaintiffs.

8 We are happy to discuss this with the defendants.
9 What actually was proposed for the week of the 18th was a
10 request to talk about just defendants' responses to our
11 discovery. They then sent a letter and said here's six
12 things we want to talk about and everyone should fly from
13 around the country to Chicago to sit in a room and talk about
14 all of these six other things. We thought that was a little
15 wasteful because, for example, there's no reason for me to
16 fly to Chicago to talk about the direct plaintiffs' discovery
17 responses.

18 So I don't think there is anything the Court needs
19 to take action on here today. Defendants want to talk about
20 a supplemental discovery plan that would essentially put in
21 place the calendar and the limits for all discovery to be
22 taken in wire harness until the case is done, and we --

23 THE COURT: In wire harness --

24 MR. WILLIAMS: Until the case is over. And we
25 agree that's something we should do, but what we don't agree

1 and what the defendants repeatedly did was create arbitrary
2 deadlines; it must happen in 30 days, period, including the
3 Thanksgiving holiday, this appearance in Court, arguing
4 motions to dismiss, whatever might happen with the DOJ stay,
5 which we now know. So we think in this case which has a
6 small amount of complexity in terms of parties and issues and
7 facts that now we're not going to really delve into because
8 of that stay that it makes some sense to have some
9 deliberation to that and we are prepared to. I think we
10 could provide them with our responses to their proposed
11 discovery plan within a couple of weeks, and then we could
12 work that out and be prepared to present it probably by the
13 end of the year if we have to, but what we don't need to do
14 is take every disparate issue in the case, put them all
15 together and say we are not going to talk to you about issue
16 A unless you come talk to us about issue B, so that's what
17 was going on. So in terms of the meeting for the week of the
18 18th that was in response to a request that we had to talk
19 about one issue.

20 What I would suggest is there is no time urgency to
21 it, and I'm not meaning to diminish their concern about this
22 point, it is a fair point, but that if we are going to now
23 agree and submit to the Court an order on all discovery
24 limits and timing for the rest of this case, it is fair to us
25 to have an appropriate time to do that, we are prepared to do

1 it promptly. The bottom line is I don't think there is this
2 critical urgency now, I don't think there is the need to
3 order a date now given how many parties need to participate
4 in that process. I think this is really not an issue the
5 Court has to take action on today, but that as with Ford and
6 the depositions we can work together, we can work it out, and
7 if the defendants really think that there is a critical
8 problem that needs the Court's time they can raise it. I
9 don't think that will happen until we see you again either in
10 February or beforehand if we are here to come back on the
11 supplemental discovery plan.

12 THE COURT: Okay.

13 MR. SQUERI: Your Honor, I would respectfully
14 disagree with Mr. Williams in a number of respects. First,
15 to some extent he's putting the cart before the horse. It is
16 a fundamental -- it is fundamental to have a discovery plan
17 in place that is going to work. The plan that we drafted and
18 sent them nearly two months ago addresses a number of issues.
19 We are happy to meet with them with regard to any issues they
20 have concerning our request or our interrogatories, we spent
21 a lot of time responding to them, they were extensive, we are
22 happy to meet with them, we are not saying we won't meet with
23 them on that, we will, but we feel that in a case that is now
24 approximately two years old, it has been five months since
25 the Court ruled on the motions to dismiss, it has been two

1 months since we sent them a draft discovery plan that is
2 intended to try to allow the parties to proceed in an orderly
3 way addressing issues of coordination, addressing timing of
4 document requests, requests being made, how the productions
5 are going to be made, issues like maximum number of
6 interrogatories and how we are going to count them. There
7 are -- and some issues regarding the way depositions are
8 going to be conducted and how we are going to try to be
9 scheduling ourselves for ultimately presenting to the Court
10 the motions for class certification that are going to be very
11 critical in this case. We think it is absolutely important
12 to do that now and not later.

13 THE COURT: Okay. That's enough. All right. Some
14 of you probably aren't old enough for this but you go to bed
15 tonight and tomorrow it is six months later, so there really
16 isn't time to put off anything in this case. I think that a
17 discovery schedule needs to be set up, there should be one, I
18 have one in every case, and I don't see this as any
19 different. I don't think it is critical that it is going to
20 be this week or next week, it is certainly not critical for
21 me to come here and pull out arbitrary dates and I don't
22 intend to do that, but I do think that you need a discovery
23 schedule in this case even before you address your issues
24 of -- your issues on discovery that you are talking about
25 meeting on.

1 So why don't you try and work out a discovery
2 schedule? Perhaps plaintiffs can give a response to whatever
3 the supplemental schedule was that defendants set and try to
4 work that out in the next 30 days so that by that time you
5 can submit to the Court a discovery schedule in the wire
6 harness cases. All right. 30 days. To be specific, what is
7 today's date, the 13th, so 30 days from today, just figure it
8 out in December.

9 I don't -- I'm not asking you to meet over the
10 holidays and all of that kind of stuff, that this is of such
11 urgency that you have to do that, this case has been going
12 along, but you do need to move and that's why I think that's
13 a first step.

14 In terms of meeting -- your meeting that you had
15 planned on the discovery issue, I don't see any reason why
16 you can't go forward with that also. You will be working on
17 two things at one time, and you can do it. Okay.

18 All right. Now going down the docket -- I want to
19 back up. On page 2 of your agenda, Ford vs. Fujikura, there
20 is a motion to dismiss. I'm thinking we'll be able to hear
21 that at our next status conference, which is February 12th.

22 I don't believe -- on number 4 I think we have
23 covered everything on the agenda, but let's talk now about
24 Ford's participation and how we classify Ford in our case,
25 and how we get it on CM/ECF?

1 MR. TORRES: Thank you, Your Honor.

2 THE COURT: Where are you exactly?

3 MR. TORRES: Thank you, Your Honor. Hector Torres,
4 again, on behalf of Ford Motor Company.

5 Where we are, Your Honor, is we are a large
6 non-class direct purchaser of wire harnesses and under the
7 existing --

8 THE COURT: You say non-class. I mean, we don't
9 have any classes yet.

10 MR. TORRES: Right, but non -- as compared to the
11 punitive class actions -- the punitive direct-purchaser class
12 actions we have a non-class action in that we are just a
13 direct purchaser and not seeking --

14 THE COURT: Wouldn't you be a direct purchaser
15 under the proposed class?

16 MR. TORRES: Pardon me?

17 THE COURT: Wouldn't you be an OEM, a direct
18 purchaser, under the proposed class in the consolidated
19 amended complaints?

20 MR. TORRES: With respect to the action against
21 Fujikura, Ford has asserted its own claim and there is -- no
22 class has been certified, it is a punitive class, but we have
23 asserted our own individual Sherman Act claims against
24 Fujikura, so with respect to that action we have the right to
25 proceed as a direct purchaser, and our action obviously does

1 not require certification because it is a non-class action.

2 THE COURT: You are not doing a class action, you
3 are doing your own separate --

4 MR. TORRES: That's correct.

5 THE COURT: Which is a companion case assigned
6 here?

7 MR. TORRES: Exactly. Now, with respect to where
8 we fit in, if you look at the initial case-management order I
9 think it makes it pretty clear that, as I indicated before,
10 that once the action was assigned to this Court, designated
11 as a case that is part of the MDL and is now in the master
12 docket for the MDL, we are now part of the MDL, the subaction
13 relating to wire harnesses.

14 Now, Section 5 of the initial case-management order
15 also provides that the case-management order -- the initial
16 one that was entered by the Court on March 29th, 2012 also
17 applies to subsequently-filed actions that are transferred to
18 the Court.

19 Now, a separate section of the CMO, section 14,
20 provides that once the case is transferred the Clerk of the
21 Court is required to place a copy of the CMO in a separate
22 file of our action and an entry, as I indicated, has already
23 been made on the master docket.

24 So the question and the relief that we were
25 seeking, which should not be controversial, simply requires

1 an adjustment or a modification or a proposed order that
2 makes clear that Ford shall be represented by its own counsel
3 in connection with its action and with respect to the
4 responsibilities that are delineated in the March 19th, 2012
5 order where the Court appointed the interim lead counsel for
6 the direct-purchaser class, she made clear that Ford has the
7 right to participate by its own counsel because under the way
8 it is currently structured, for example, with respect to the
9 opposition to this Fujikura brief, if you applied the CMO
10 order technically the interim lead counsel for the class
11 direct purchasers is the only entity -- the only party that
12 has a right to submit a brief. Well, obviously now there is
13 a non-class party here and Ford should be entitled to
14 participate in the lawsuit in connection with all the
15 responsibilities that are designated in the March 19th order
16 with respect to its action.

17 There is one additional adjustment with respect to
18 paragraph 16 of the case-management order which provides for
19 service of documents or filings that are not electronically
20 filed on the interim lead counsel for the punitive direct
21 class, the requested modification is to make clear that
22 Ford's counsel also has a right to the filings that otherwise
23 are covered by paragraph 16 of the CMO.

24 THE COURT: Wait a minute. Paragraph 16? Let me
25 just look. Okay.

1 MR. TORRES: That's it, Your Honor. Thank you.

2 MR. WEILL: Randall Weill again, Your Honor, for
3 direct purchasers.

4 We don't have any problem with what Ford is
5 proposing to the extent that it wants to be represented by
6 its own counsel and to the extent that the defendants don't
7 have an objection to participate in discovery, that's fine.
8 The issue is about signing protective orders and that kind of
9 thing are a concern with respect to highly-confidential
10 information that we can't disclose unless Ford is part of
11 that protective order, if we have that from the defendants,
12 we can't expose ourselves to that, so that's an issue that
13 Ford would have to work out with the defendants, and in the
14 context of its case how does discovery proceed where it has
15 only sued Fujikura and we have sued, of course, six other
16 defendants, and then how does those -- how do those
17 relationships work where Ford has its own case?

18 Now, with respect to Ford as an individual case,
19 not a class case, we would suggest that it has nothing to do
20 with us as class counsel but maybe should be accommodated as
21 part of the original case-management order under part B,
22 which speaks to a coordination of the indirect, the
23 auto-dealer, the end-payor and the direct-purchaser cases
24 because as direct purchaser counsel we don't represent auto
25 dealers or end payors, and similar as class counsel for

1 direct purchasers now that Ford has entered an appearance
2 with their own case and their own counsel we don't purport to
3 represent them in any way. I mean, we hope and look forward
4 to cooperating with them but looking at the existing
5 case-management order perhaps the way to accommodate Ford's
6 concern is to simply state that Ford is a coordinated case,
7 not a consolidated case, a coordinated case within the
8 meaning of part B of case-management order number 1. I think
9 that gives Ford the comfort it needs to go forward being
10 represented by its own counsel to pursue its own claim
11 against Fujikura.

12 THE COURT: All right. What do you have to say
13 about that?

14 MR. COOPER: Good morning, Your Honor.
15 James Cooper on behalf of Fujikura.

16 I don't think we disagree, we certainly want Ford
17 to be coordinated in all of the discovery as we have spent
18 time talking to you about this morning it should be
19 coordinated. I wasn't sure -- there are some technical
20 things that are required before I think the Ford case is
21 officially part of these coordinated cases; there has to be a
22 copy of the case-management order that is entered in the Ford
23 docket, there has to be -- the master docket has to have an
24 entry reflecting coordination of the Ford case, but we don't
25 have any objection to those things happening, I just don't

1 think they have happened yet.

2 THE COURT: Well, they haven't happened yet and we
3 need to come up with a number in CM/ECF for you. Let me just
4 tell you something I was thinking of; we have the 100 direct,
5 200, 300, maybe Ford would be a 400 number or do you think it
6 should be filed under the -- this is beyond you?

7 MR. COOPER: Yes, this is above my level of
8 competency, Your Honor.

9 THE COURT: It would be 104 when we have our
10 classes. We have, you know, 101 for direct, 102 for dealers,
11 103 for end payors, and I'm saying 104 might be Ford. It is
12 just a category to put all the Ford stuff in. It is just --
13 which I think I might do unless you think about it. Where is
14 Mr. Iwrey? You always do those computer things. Think about
15 that.

16 MR. IWREY: That would work.

17 THE COURT: Would that work? Because we also
18 have -- we are going to come up with some others like we need
19 some miscellaneous things like Ford would be four but we have
20 some miscellaneous like Florida --

21 UNIDENTIFIED ATTORNEY: The State of Florida, Your
22 Honor.

23 THE COURT: Florida, yeah, maybe 5. Think about
24 it, Mr. Iwrey, and I'm going to have my clerk call you and
25 see is this okay, we are going to add these in that way and

1 then we will send a notice to everybody. Okay.

2 MR. TORRES: Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. SQUERI: Your Honor, Stephen Squeri again just
5 speaking on behalf of the other defendants who haven't been
6 sued by Ford.

7 For the record, we do agree with coordination
8 between the cases and encourage that and think that the
9 parties ought to sit down and work that out. The only thing
10 I would just say is that coordination does not mean that Ford
11 becomes a plaintiff in cases where they haven't filed a
12 lawsuit, but as far as we are concerned we are more than
13 happy and we think it is the right way to go in terms of
14 coordinating all the discovery efforts, and I'm prepared to
15 sit down and talk to them about that.

16 THE COURT: What I would like is for you to --
17 maybe both of you or three of you to go over all of these
18 orders and see what needs to be modified in order to
19 accomplish this coordination and then submit orders by way of
20 stipulation.

21 MR. TORRES: Certainly, Your Honor.

22 THE COURT: Okay.

23 MR. SQUERI: Thank you, Your Honor.

24 THE COURT: Thank you. All right. Instrument
25 panel clusters?

1 MR. SQUERI: Excuse me, Your Honor. Your Honor,
2 with respect to the wire harness defendants, I have been
3 asked by some of them if they could have the Court's leave to
4 leave the hearing at this point in time? They say they don't
5 have any other business but they wanted me to communicate
6 that to the Court or make that request on their behalf.

7 THE COURT: Certainly. Anybody who does not need
8 to participate in the rest of this feel free to leave.

9 All right. Instrument panel cluster update. Who
10 is going to speak to that? There is a motion pending on
11 that.

12 MR. FINK: Your Honor, David Fink with direct
13 plaintiffs.

14 Other than the update that is included, and
15 obviously the oral argument to proceed later, there is
16 nothing that we have to address.

17 THE COURT: Okay. I'm thinking on that instrument
18 panel cluster that there is Nippon Seiki's motion to dismiss
19 in the Florida case, and Florida's response is due around
20 Christmas, the reply is due February 3rd, but I think we are
21 going to set that case also for argument on February 12th. I
22 think we can get it in there. Okay. Is that -- all right.
23 Okay. So February 12th on the Florida complaint and Nippon's
24 response.

25 On fuel senders, the motion will be heard on

1 February 12th as indicated on the calendar.

2 The heater control -- well, we'll have those
3 arguments.

4 MR. HANSEL: Your Honor, Greg Hansel in heater
5 control panels on behalf of the direct purchasers.

6 As Steve Cherry reported during the wire harness
7 portion of the program a little earlier, Denso -- his client
8 Denso has reached an agreement with the three groups of
9 plaintiffs, three groups of class plaintiffs, on a
10 stipulation between them and Denso with respect to
11 incarcerated persons from Denso. We haven't signed it yet
12 but we have reached agreement on the terms and will be
13 signing that and submitting it to the Court.

14 THE COURT: Good.

15 MR. HANSEL: Thank you.

16 THE COURT: Thank you. All right. Bearings, we
17 have motions due, reply is March 25th, and I think this goes
18 to the next hearing date after the February 14th so let's
19 just take a break and talk about that. I'm thinking
20 June 4th, it's a Wednesday. It could have been the end of
21 May but I don't want to do anything during the summer because
22 it is too hard to get you all together, so I thought if we
23 did June 4th, June, July, August, we could then meet early in
24 September, I don't have a date yet, we will discuss it in the
25 next week. How is June 4th? Anybody have any -- I hope

1 that's before graduations and all of those things. Okay.

2 All right. Let's plan June 4th then, and so the bearings
3 motions will be heard on that date.

4 On the occupant safety we have motions that were
5 filed, replies are due February 10th, and I don't think I can
6 fit that in on the 14th so the date for oral argument on that
7 one will also be June 4th.

8 Do we have anything else on the update on
9 stipulation on occupant safety? I don't think there is.

10 MR. HANSEL: Nothing further.

11 THE COURT: Then we have anti-vibration rubber
12 parts. Is there anything else outside of that update?

13 (No response.)

14 THE COURT: No. Okay. Then we have all of our
15 other actions, and basically all I'm going to say on that is
16 we will follow the same procedure that we have been following
17 as we add them on. They will be getting their CM/ECF numbers
18 and you will be notified obviously of those numbers for those
19 cases.

20 The next thing is -- oh, let me ask the Government.
21 Where is the Government attorney? We are up to I believe I
22 counted 27 now, and you have an ongoing investigation. Do
23 you have any idea when and if or if and when there will be
24 more parts? I don't like that smile.

25 MR. GALLAGHER: Unfortunately I actually wish I had

1 left before you --

2 THE COURT: Yes, asked that question.

3 MR. GALLAGHER: -- raised that question, that was
4 something I was hoping to avoid today.

5 I don't have any information that I can provide to
6 the Court at least in open court.

7 THE COURT: Okay.

8 MR. GALLAGHER: If additional information is needed
9 I'm happy to address the Court in --

10 THE COURT: No. I think we have plenty to keep us
11 busy right now so I'm not worried about it, but I will in the
12 six months, so in two settlement conferences, I will want
13 something in writing from you on the status if you expect to
14 ask for further delay.

15 MR. GALLAGHER: Understood, and that's part of the
16 stipulation is the fact that the stay goes on for six months
17 and then we will continue unless somebody moves to modify,
18 but regardless of whether anybody moves to modify the
19 Government will provide the Court with a written status
20 update indicating anything that no longer needs to be subject
21 to the stay.

22 THE COURT: Okay. Thank you.

23 MR. GALLAGHER: Thank you.

24 THE COURT: All right. The next status conference
25 is February 12th at 11:00. The next one after that will be

1 June 4th at 11:00. Right now I'm not scheduling any interim
2 conferences. If they should become necessary you will have
3 to obviously let me know. I will be looking for those
4 discovery issues that we had talked about before so I can see
5 what needs to be done with that.

6 The only other thing I do want, it is not on the
7 agenda, but I want an update on attorney fees from
8 plaintiffs.

9 MR. HANSEL: Jury fees?

10 THE COURT: Attorney fees. When did we get it
11 last? I think it has been a couple months. Go ahead.

12 MS. SALZMAN: Hollis Salzman for the end payors.

13 The last report we gave you I believe was June.
14 Would you like us to update that?

15 THE COURT: Yes, I would.

16 MS. SALZMAN: Okay.

17 THE COURT: Thank you. Anything else? Anybody
18 have anything else?

19 MR. BALL: May I approach?

20 THE COURT: Certainly.

21 MR. BALL: May it please the Court, my name is
22 Gordon Ball of the Tennessee bar, and --

23 THE COURT: I could tell.

24 MR. BALL: I understand. I have been accused of
25 that before.

1 Earlier this week we filed five new separate
2 end-payor cases specifically against Denso Corporation. Of
3 course, obviously they have not been served. And yesterday
4 we filed a motion in those cases and a copy of which was
5 delivered I think hopefully to your chambers and a copy to
6 hopefully the end-payors' counsel, and obviously it is not
7 ripe for consideration at this point in time, but I just
8 wanted to introduce myself to the Court, and hopefully our
9 motion if granted by the Court will aid the Court and the
10 plaintiffs in this case. So I just wanted --

11 THE COURT: Your motion will aid us? Good. We
12 will take all the help we can get.

13 MR. BALL: I would hope it would aid the
14 plaintiffs.

15 THE COURT: I haven't had a chance to read it, my
16 clerk did tell me that these came in. You are end payors on
17 what products?

18 MR. BALL: On the five separate ones, heater
19 control panels, air conditioner systems, air flow meters,
20 fuel injection systems and the ignition coils. All of those
21 are made by Denso in Tennessee, if Your Honor pleases.

22 THE COURT: Is your aim to get the Tennessee state
23 laws into this? I mean, what are we doing here?

24 MR. BALL: Yes, the Tennessee -- and I don't want
25 to argue to prejudice --

1 THE COURT: No, I don't want you to argue, I'm just
2 trying to figure out where you are coming from.

3 MR. BALL: My aim is to get the Tennessee --
4 Tennessee law -- Tennessee is the only state in the country
5 that allows nonresident purchasers --

6 THE COURT: Oh, we are not going there.

7 MR. BALL: -- to avail themselves of Tennessee law.

8 THE COURT: Oh, of Tennessee law.

9 MR. BALL: To avail themselves of Tennessee law,
10 and that's been accepted -- it has been granted -- ruled upon
11 by the Tennessee court in the Freeman case, which we attached
12 to our motion, it's been ruled upon and granted by federal
13 district courts in this Sixth Circuit.

14 THE COURT: I don't want to get into argument on
15 that, I really do not.

16 MR. BALL: I understand, I don't want to argue that
17 either, but that's our -- I just wanted to introduce myself
18 to the Court.

19 THE COURT: Thank you very much.

20 MR. BALL: Thank you.

21 THE COURT: So we may have another -- we have to
22 figure out where to put you in the case-numbering schedule.

23 MS. SALZMAN: Your Honor, Hollis Salzman again.

24 Just briefly, we were just served with Mr. Ball's
25 papers last night. We were obviously preparing for the

1 briefing, so we really would like an opportunity to analyze
2 what he's filed and to present something to the Court to aid
3 the Court in its decision.

4 THE COURT: Okay. Why don't you do that, but we'll
5 have this on the agenda for the next status conference and
6 see --

7 MS. SALZMAN: Thank you.

8 THE COURT: -- where we end up with that, but I
9 would appreciate anything you had before that so that we
10 can -- I can be prepared to rule or others can be prepared to
11 file whatever they want to file.

12 MS. SALZMAN: Thank you.

13 THE COURT: Okay. Thank you. Is there anything
14 else?

15 (No response.)

16 THE COURT: All right. We are going to break for
17 lunch and then we will do the motions. We are going to do
18 the instrument panel motions followed by the heater control
19 motions. I would suggest that you have 10 to 15 minutes per
20 side. You don't need to repeat. And what am I looking for?
21 I know you called and everybody was excited about this. I'm
22 looking to see what is different from the wire harness case,
23 I will be very blunt. If it is the same argument, you may
24 not agree with me and I can appreciate that, but I'm
25 consistent, so just keep that in mind.

1 Let's take -- let's come back by 2:00. Okay.

2 2:00. Thank you.

3 THE LAW CLERK: All rise. Court is in recess.

4 (At 12:39 p.m. court recessed.)

5

6 -----

7 (Court reconvened at 2:06 p.m.; Court, Counsel and
all parties present.)

8 THE CASE MANAGER: All rise.

9 The United States District Court for the Eastern
10 District of Michigan is now in session, the Honorable
11 Marianne O. Battani presiding.

12 You may be seated.

13 THE COURT: Good afternoon. All right. The first
14 motion we will do is the collective defendants' motion in the
15 instrument panel case against the direct purchasers.

16 MR. CHERRY: Good afternoon. My name is
17 Steve Cherry, again, and I'm with the law firm Wilmer Hale.
18 I represent Denso but I'm going to be speaking on behalf of
19 all the defendants.

20 THE COURT: All right. You may proceed.

21 MR. CHERRY: Thank you. Well, ACAP's complaint
22 should be dismissed because ACAP lacks standing to sue and
23 also because it fails to allege facts sufficient to establish
24 the material elements of ACAP's claim.

25 Now, the few facts set forth in the complaint

1 actually contradict ACAP's claim that it was harmed by the
2 conspiracy that ACAP alleges. Beyond that, ACAP alleges no
3 facts to link its own alleged purchases to defendants' guilty
4 pleas or to plausibly suggest that the market conditions
5 would have caused defendants' conduct to have an impact on
6 all prices of all instrument panel clusters sold to all
7 customers.

8 Now, this case involves a single punitive
9 direct-purchase plaintiff, ACAP.

10 THE COURT: Now, ACAP was the one that was out of
11 business in a year --

12 MR. CHERRY: Exactly.

13 THE COURT: -- from the conspiracy?

14 MR. CHERRY: Yes, its voluntarily liquidation
15 proceedings in mid 2002, it filed materials on its own behalf
16 that established that its sole business had previously been
17 to assemble dashboards for GM's Cadillac Deville, but it went
18 out of business and liquidated in 2002, laid off all of its
19 employees, sold all of its equipment, and it has not been an
20 L.L.C. in good standing in the State of Michigan since then.

21 Nonetheless, ACAP purports to assert a Sherman Act
22 claim against Yazaki, Nippon Seiki and Denso for an alleged
23 conspiracy between January 2001 and February 2010. Now, ACAP
24 alleges that defendants Yazaki, Nippon Seiki and Denso
25 colluded as to RFQs to certain automobile manufacturers

1 referred to as OEMs during that time period, and ACAP alleges
2 that RFQs were issued three years before the sales of any
3 products actually occurred.

4 So we have two main points, Your Honor. The first
5 is that ACAP lacks standing to sue. ACAP has no standing to
6 sue because it could not have been harmed by the conspiracy
7 it alleges. Under the facts alleged in the complaint an RFQ
8 issued in January of 2001 at the start of the alleged
9 conspiracy would not have resulted in sales until 2004, which
10 is two years after ACAP had gone out of the business. Point
11 number two, ACAP alleges no fact to support any claim for
12 relief.

13 As an initial matter we should note that the
14 complaint in this case contains none of the factual
15 allegations that this Court found sufficient to state a claim
16 in wire harnesses. ACAP points out that two of the
17 defendants, Yazaki and Nippon Seiki, have pleaded guilty as
18 to instrument panel clusters but on their face those pleas
19 have no connection to ACAP. Yazaki's plea agreement concerns
20 sales to certain OEMs but between December 2002 and
21 February 2010. That's obviously after ACAP was already out
22 of business.

23 Nippon Seiki's plea agreement concerns sales to a
24 single OEM, and that was between April 2008 and
25 February 2010, so that's years after ACAP was out of the

1 business.

2 ACAP also refers to Denso's plea agreement but
3 Denso's plea concerns two entirely different products, body
4 ECUs and heater control panels, and concerns sales to only
5 one OEM, Toyota, so again obviously no connection to ACAP.
6 That's it.

7 Other than that the complaint is really just a
8 bunch of boilerplate and entirely conclusory assertions
9 without factual grounds to support them.

10 THE COURT: Who is the other plaintiff there,
11 Collins and Aikman, is that it?

12 MR. CHERRY: One plaintiff, ACAP.

13 THE COURT: What is Collins and Aikman, is that
14 another name for them?

15 MR. CHERRY: Yeah, I think that was an initial name
16 for ACAP.

17 THE COURT: Okay.

18 MR. CHERRY: So ACAP's complaint includes
19 conclusory assertions about meetings among defendants and
20 agreements to RFQs issued by an OEM, but each of those
21 assertions is lifted directly word for word from the
22 defendants' plea agreements where they were supported by
23 actual factual allegations to support, you know, those
24 assertions in the plea. But as we just went through, the
25 plea agreements have nothing to do with ACAP. And standing

1 alone divorced from the plea agreements and the facts that
2 contain therein these are just conclusory assertions with no
3 factual grounds to support their application to ACAP.

4 THE COURT: There was some discussion, I believe
5 this morning somebody raised this RFQ process and how in the
6 alleged conspiracy an RFQ may go to -- you know, one
7 manufacturer said you deal with this model car, the other
8 manufacturer you deal with this model car, that was alleged
9 in some of these parts. Could this somehow affect ACAP? In
10 other words, maybe it didn't do the particular model cars
11 that --

12 MR. CHERRY: There's no allegations of that, Your
13 Honor. The allegation here is really just a bald assertion
14 that there's these pleas that, as I just said, have nothing
15 to do with ACAP and we must have fixed prices for all
16 instrument panel clusters to all customers everywhere of
17 every kind. That's their overarching claim. We pled guilty,
18 as I just described, so we fixed prices to everyone, and
19 there is nothing to support that.

20 And as I just said, there are these bare assertions
21 but they are taken right out of the plea where there are
22 factual allegations that lead to those assertions but there
23 are none supporting them in ACAP's plea, they took them out
24 of pleas where they made sense, they are putting them in
25 their complaint where there is nothing to support them.

1 THE COURT: But there is a general bid-rigging
2 allegation?

3 MR. CHERRY: It is an allegation, it is not a fact,
4 Your Honor. There's no facts to support its application to
5 ACAP. And this next point goes to their overarching claim.
6 They really allege in even more conclusory assertion that
7 defendants knew -- this is really the key to their claim,
8 paragraph 75 and paragraph 76 of their complaint. They
9 allege having just referred to the pleas that -- and these
10 conclusory assertions about meetings, that defendants knew
11 and intended that their actions in responding to certain RFQs
12 issued by OEM would have a direct impact on all prices of all
13 purchasers of all types of IPCs but, again, there are no
14 facts to support that conclusion of theirs, and that's
15 exactly at this point --

16 THE COURT: Are you saying there's no facts or it
17 is impossible because of the three year RFQ process and the
18 2001 --

19 MR. CHERRY: Well, there's two points. The first
20 one, it is impossible, but even if they were doing business
21 in the time period there's no facts alleged to support that
22 conclusion, and this goes directly to Ashcroft vs. Iqbal. In
23 Ashcroft vs. Iqbal there were allegations the plaintiff had
24 been abused in prison and was alleging claims against various
25 people but including John Ashcroft and the FBI Director

1 Mueller. And as the Supreme Court said, we begin our
2 analysis in looking at any complaint by identifying the
3 allegations in the complaint that are not entitled to the
4 assumption of truth, and that's what we have here. And I'm
5 quoting, respondent pleads that petitioners knew of, condoned
6 and willfully and maliciously agreed to subject him to harsh
7 conditions of confinement as a matter of policy solely on
8 account of his religion, race and/or national origin for no
9 legitimate penological interest, and the complaint alleges
10 that Ashcroft was the principal architect of this invidious
11 policy and that Mueller was instrumental in adopting it and
12 executing.

13 The court recognized that if those were facts that
14 they may have stated a claim, it may have been sufficient,
15 but the Court rejected that conclusion and instead the
16 Supreme Court held, and I'm quoting again, these bare
17 assertions, much like the pleading of conspiracy in Twombly,
18 amount to nothing more than a formulaic recitation of the
19 elements of a claim. As such, the allegations are conclusory
20 and are not entitled to be assumed true.

21 That's all we have here is this formulaic, bare
22 assertions that are not entitled to be assumed true. And it
23 is important to note the differences between this case and
24 wire harnesses, as Your Honor mentioned that you wanted to
25 hear. And, of course, in wire harnesses we had plaintiffs

1 who were still -- it was our understanding was still in
2 business and allegedly purchased various wire harness
3 products directly from at least some of the defendants
4 throughout the alleged class period. So the standing issue
5 that we just discussed that ACAP was not in business at the
6 time of any instrument panel cluster sale impacted by the
7 alleged conspiracy was not present in wire harnesses at all,
8 so that's a very different set of circumstances.

9 But there is also a second critical distinction.
10 In wire harnesses the Court found that plaintiffs had made
11 certain specific factual allegations about the
12 characteristics of the market for wire harness products that
13 were sufficient to bridge the gap between defendants'
14 narrower guilty pleas and the overarching conspiracy claim in
15 wire harnesses. And in particular plaintiffs had alleged
16 specific facts showing market concentration -- you will
17 remember their chart that showed the market shares, they
18 showed the market that was heavily concentrated -- and that
19 defendants had market power, and they also alleged facts
20 showing an effect on prices generally. In fact, in wire
21 harnesses the plaintiffs allege specific facts to show that
22 the market was heavily concentrated and defendants had market
23 power. They showed that --

24 THE COURT: Well, here they showed they had the
25 majority. I think the words were the majority of the market.

1 MR. CHERRY: No, they don't allege that here, Your
2 Honor.

3 THE COURT: Not in the instrument panel?

4 MR. CHERRY: No, they don't, Your Honor. There is
5 no allegation that says that. In wire harnesses they allege
6 that six of the defendants accounted for over 70 percent of
7 the market share, and if you add one other company, just one,
8 that was initially named as a defendant you get to over
9 90 percent. So there's facts there, not just a conclusion
10 that it is heavily concentrated but they show facts to
11 support that conclusion that concentration, market power on
12 behalf of the defendants. Those allegations are essential to
13 the cases they rely on.

14 They cite to *In re: Packaged Ice*. In *Packaged Ice*
15 beside having specific allegations of the agreements among
16 the defendants, the court also relied on the fact that there
17 were allegations that the three defendants had over
18 70 percent of the market share, it was a concentrated market,
19 they had market power.

20 In *In re: Ductile Iron Pipefitting*, which is a case
21 again that ACAP relies upon, there were detailed factual
22 allegations about the agreement, communications among the
23 defendants, but more importantly, and this was something the
24 court repeatedly came back to, as there were detailed factual
25 allegations about market concentration and market power. In

1 fact, the defendants had 90 percent of the market for import
2 ductile iron pipefittings and 100 percent of domestic -- of
3 the domestic market, and that was critical to the court's
4 decision.

5 I would also note in that case, which again ACAP
6 relies upon, the court also noted that the plaintiffs also
7 specifically alleged what they bought, who they bought it
8 from and when they bought it, so it showed that their own
9 purchases lined up perfectly with the agreements that were
10 alleged, unlike in this case, and when the plaintiffs -- and
11 when the defendants had this market power.

12 But here ACAP alleges no facts to show market
13 concentration or that defendants had market power either
14 individually or collectively. ACAP fails to allege the three
15 defendants collective market share even in the most general
16 terms.

17 THE COURT: Let me ask you this because you are
18 running out of time.

19 MR. CHERRY: Yep.

20 THE COURT: Let's go to the unjust enrichment
21 claims --

22 MR. CHERRY: That's not in the direct purchasers.

23 THE COURT: -- in the direct purchasers.

24 MR. CHERRY: No.

25 THE COURT: Okay. That's not in it. That's the

1 question.

2 Now, do you have -- what do you -- if you were on
3 the other side, if you were plaintiff, what would you have to
4 support the claim, the antitrust claim?

5 MR. CHERRY: Your Honor, this claim should not have
6 been brought. Their pleas are clearly a disconnect with
7 their client and there are no facts here to support the claim
8 they are trying to bring.

9 THE COURT: Okay. Let me hear what they have to
10 say.

11 MR. CHERRY: Thank you.

12 THE COURT: Plaintiff?

13 MR. KOHN: Thank you, Your Honor. Joseph Kohn,
14 Kohn, Swift & Graf, for ACAP and direct-purchaser plaintiffs.

15 Your Honor had said this morning you did not want
16 to hear the case if it was the same -- or the arguments that
17 were the same as wire harness. This is not the same as wire
18 harness. From our perspective this case the facts are
19 better.

20 THE COURT: How are they better when you have got
21 this company that hardly had time to be damaged, if it was
22 damaged at all?

23 MR. KOHN: Your Honor, the class period we have
24 alleged is from 2001 forward. ACAP, and these were issues
25 that were decided by Your Honor, is in the exact same

1 position as were the supplier direct-purchaser plaintiffs in
2 wire harness. Your Honor dealt with all of these same
3 arguments about the guilty pleas in wire harness, they only
4 referred to auto manufacturers. They referred to, and I have
5 them here, I can read from the Denso plea, referred to a
6 manufacturer. Yazaki referred to certain auto manufacturers.
7 We heard all of these same arguments and Your Honor dealt
8 with the reams of briefing and incorporated and digested all
9 of that law that that did not impair or require the dismissal
10 of the claims by the supplier plaintiffs who were also direct
11 purchasers.

12 In looking at the decision in the version I was
13 working off of was the one in the 2013 trade cases, it is
14 paragraph 78418, so it begins with the asterisk page 9, and
15 Your Honor wrote, OEMs may have been the largest group of
16 direct purchasers but according to the CAC they are not the
17 only direct purchasers. The CAC contains allegations that
18 each DPP, direct purchaser, purchased wire harness product
19 directly from one or more of the defendants during the class
20 period. The fact that they are not automobile manufacturers
21 did not change the fact that they purchased directly from the
22 defendants.

23 The same allegations here. The -- Mr. Cherry just
24 referred to the complaint and the allegations we made in the
25 wire harness complaint and tried to contrast them with the

1 allegations we made in this complaint.

2 THE COURT: If we have only one plaintiff --

3 MR. KOHN: Right.

4 THE COURT: -- why isn't there an allegation about
5 what was purchased and from whom --

6 MR. KOHN: Well, the allegation --

7 THE COURT: -- with one plaintiff?

8 MR. KOHN: The plaintiff has made the appropriate
9 allegations it purchased during the class period and it did.
10 It purchased hundreds of thousands, if not millions, of
11 dollars worth of these products during the period of time
12 that it was in business, which includes the class period. It
13 is not necessary that a class representative have purchased
14 continuously or continually throughout a period of a
15 conspiracy. A purchase in the -- of the affected product
16 during the period of the conspiracy gives one standing to
17 assert that claim, any different than let's take an end-payor
18 purchaser, they buy an automobile, they don't buy an
19 automobile every day or every year or every model of
20 automobile. The purchasers in the cargo -- the Air Cargo
21 case, the plaintiffs, some were in business for certain
22 periods of time, others were in business for other periods of
23 time.

24 THE COURT: That's a direct purchase --

25 MR. KOHN: You don't have to show a direct purchase

1 throughout or bracket the entire class period to have
2 asserted the claim for Rule 12 purposes. There may be
3 some --

4 THE COURT: But how in this case the way this comes
5 about did the -- how the conspiracy worked, how did they
6 purchase something before the conspiracy unfolded, that's in
7 2001, I mean, there has to be something purchased then?

8 MR. KOHN: Yes. ACAP was in operation through the
9 middle of 2002.

10 THE COURT: But if --

11 MR. KOHN: So they did purchase within the class
12 period, the period of the conspiracy that we have alleged.
13 What defendants are trying to say is, ah, let's look at those
14 guilty pleas, that's our safe harbor. The first guilty plea
15 begins December 2002, Yazaki. And I would point out, Your
16 Honor, that the guilty plea on its face says at least as
17 early as December 2002 that the conduct occurred.

18 THE COURT: So if that conduct occurred in 2002 --

19 MR. KOHN: Correct, and we contend it occurred
20 earlier. And again, as Your Honor ruled in wire harness on
21 this issue of timing, this was at asterisk page 7 of the
22 trade cases, Your Honor was distinguishing the Iowa Concrete
23 case, quote, in the case before this Court it is not
24 necessary to confine the admissions regarding the product or
25 time frame to those defendants that have pleaded guilty.

1 So this is right back where we started from last
2 December when we were arguing and we briefed them. The
3 guilty pleas are facts that are asserted in the complaint
4 from which the Court can draw inferences and which gives meat
5 to the bones that puts us beyond Twombly where there were no
6 facts, where there were no guilty pleas, where there were no
7 admissions. No one in the Ashcroft case admitted guilt. If
8 there had been guilty pleas by the head of the prison
9 department or somebody who worked and then undersecretary of
10 this or the deputy attorney general, then that case would
11 have proceeded. We have -- Your Honor has ruled and the case
12 law from the Fructose case and others that time period of the
13 guilty plea is not a safe harbor, it is a fact.

14 We have from our investigation, and we believe in
15 good faith and there are other ways that defendants could
16 test if they didn't believe it, have asserted a class period
17 beginning in 2001. This class representative, proposed class
18 representative, this plaintiff, purchased its -- actually it
19 is millions of dollars worth of IPC and I have seen samples
20 of the invoices and we have seen the computer runs from their
21 records up through the period of time that they ceased doing
22 business in mid 2002, we contend that is part of the
23 conspiratorial period, and the facts of the complaint are
24 sufficient to allege that.

25 THE COURT: What about the market-share argument?

1 MR. KOHN: Your Honor, we do allege a number of
2 things about the economics. Let me just find my note on that
3 having my papers out of order. We allege facts concerning
4 price and elasticity, we allege the barriers to entry, which
5 Your Honor focused on and which were alleged in the wire
6 harness. We did not have the words market concentration,
7 which were in the other complaint in wire harness, I do not
8 believe that those are some sort of magic words or magic
9 incantation. We did have in paragraph 52 of our complaint
10 allegations, which I do not believe were in the wire harness,
11 that, quote, a cartel existed. That it had, quote, cartel
12 profits. That's paragraph 52 of the ACAP complaint.

13 I believe that concept of cartel has within it a
14 notion of market concentration and the ability to control
15 price as do our allegations about price and elasticity. So I
16 don't think -- you know, they are trying to obviously --
17 defendants are trying to latch onto any way they can to
18 distinguish this from and get out from under the law that
19 Your Honor has announced, which really is the most
20 significant decision in this field since we were here arguing
21 these motions a year ago. There is no other change in the
22 law. The wire harness decision is the leading recent case.
23 So they are looking for some word that they can grasp onto
24 that we didn't --

25 THE COURT: Just one more thing. I want to go back

1 again because I have to get this clear in my mind. These
2 RFQs are done three years in advance?

3 MR. KOHN: Right.

4 THE COURT: So the purchasing doesn't actually
5 start until say the end of the third year, right?

6 MR. KOHN: Your Honor, we do not believe that that
7 is --

8 THE COURT: Is that right or no?

9 MR. KOHN: In certain circumstance that is, but we
10 have not confined our complaint to those allegations, and I
11 think again there are some leaps here that I would like to
12 clarify if I could.

13 THE COURT: It is because -- let's even say that
14 2010 was the beginning of the conspiracy, so then we get
15 to -- I mean -- I don't mean 2010, I mean 2000 was the
16 beginning of the conspiracy, so then we would get to 2003
17 before we have any damage, any injury?

18 MR. KOHN: No, Your Honor. The Yazaki guilty plea
19 starts -- it says at least as early as December 2002. It
20 also -- it does not limit itself to the -- and does not
21 define or limit the conspiracy to this lead-time argument
22 that the defendants are asserting. In fact, the guilty plea
23 says during the relevant time period, which was at least as
24 early as 2002, one of the offenses is that they received
25 revenue and payments. That is a factual dispute as to when,

1 you know, these RFQs began, when they were fixed, when it
2 started to affect commerce. The guilty pleas talk about an
3 effect on commerce beginning at least as early as
4 December 2002.

5 THE COURT: Okay.

6 MR. KOHN: So it is not cast in stone or carved in
7 granite that there is this three-year lead time, then
8 arguably the guilty plea would begin in 2005. So those are
9 issues that are the subject of discovery, and as Twombly
10 said, have we established -- have we nudged ourselves across
11 the line such that we can have that kind of discovery to put
12 the precise parameters of damage around those facts? We do
13 make an allegation both in harness and in this case about
14 that process but we by no means meant to or did limit our
15 claim to that.

16 I would ask the Court -- counsel referred to I
17 think paragraph 75 or 76 of the ACAP complaint, these prices
18 affected both the bids and it was then the baseline price for
19 other purchases. That is precisely what we alleged in wire
20 harness, paragraphs 98 and 99 of the wire harness complaint,
21 our direct-purchaser complaint, suppliers to OEMs have been
22 required to purchase wire harnesses at prices established by
23 the OEMs. It is important to the success of the cartel that
24 the prices paid by OEMs in order to control the prices paid
25 by all other direct purchasers of wire harnesses, that's the

1 ACAPs and the plaintiffs in wire harness.

2 Paragraph 112 of wire harness, defendants' pricing
3 actions regarding their sales of wire harness products to
4 automobile manufacturers had an impact on prices for wire
5 harness products for all direct purchasers of wire harness
6 products throughout the United States, and that's the --
7 those are the allegations which Your Honor upheld in the
8 pages that I cited to the Court earlier.

9 Paragraph 69 of the ACAP complaint, we allege the
10 winning price is also used when the OEM suppliers that were
11 not part of RFQ process purchased, so that is another fact.
12 Defendants may dispute it, they may say that price doesn't
13 take effect until some years later, we say it is the price
14 that is used.

15 I stood before Your Honor in the wire harness
16 argument, I posited the hypothetical of the beverage
17 distributors, the bottled water, the soda distributors, if
18 they had a bid-rigging scheme in the city to the big hotels
19 and that becomes the price that the bars or the smaller
20 restaurants would pay.

21 We have looked at materials, we have looked at
22 documents, there's confidentiality and cross orders. I'm not
23 to disclose what those say except to say we stand before the
24 Court and assert that theory with respect to this claim.
25 There was a rigged-bid price, that is the price that becomes

1 the base price that everybody else who purchases was
2 affected. That's our claim. The guilty pleas do not cut off
3 the time, Your Honor has already ruled to that effect.

4 THE COURT: All right.

5 MR. KOHN: And, indeed, the guilty pleas on their
6 face go back sometime at least as early as the guilty pleas
7 in wire harness, there were a number of them that were in the
8 period '03 to '09, they were all over the lot in terms of
9 their time period. They did not have a uniform time frame
10 and the courts sustained allegations for a time period before
11 that.

12 ACAP, Your Honor, is an L.L.C. in being. It is
13 registered in what they call the LARA in Michigan, the
14 Department of Licensing and Regulatory Affairs. It is -- it
15 files tax returns every year. The management --

16 THE COURT: It just doesn't do business --

17 MR. KOHN: It is winding down.

18 THE COURT: -- for a number of years.

19 Okay. That's enough.

20 MR. KOHN: Thank you, Your Honor.

21 MR. CHERRY: Can I just make a couple last points,
22 Your Honor?

23 THE COURT: One minute.

24 MR. CHERRY: Thank you. Your Honor, it is ironic
25 that, you know, the plaintiffs are usually getting on the

1 defendants about arguing about the plea agreement, they want
2 to focus on the complaint. I heard Mr. Kohn up here talking
3 about the plea agreement says this or that. I'm focusing on
4 the complaint. In the complaint it says that OEMs issue RFQs
5 and that the products are sold three years later. In fact,
6 that's really the way it works. They, we know, from their
7 bankruptcy filings were, in fact, a supplier to OEMs -- to
8 one OEM, GM, so they do fit into that process, but they --

9 THE COURT: Your client in its plea talked about --

10 MR. CHERRY: To Toyota, one OEM, to Toyota.

11 THE COURT: But it talked about a time period?

12 MR. CHERRY: Yes.

13 THE COURT: The effect of it?

14 MR. CHERRY: Yes, the time period of the
15 conspiracy, not the time period of sales, the time period of
16 the conspiracy, which is what their complaint says. They
17 said there was a conspiracy from December 2001 to
18 February 2010. If there is a conspiracy starting in
19 December 2001 and an RFQ takes three years, which it does,
20 that tainted RFQ results in sales years after they have gone
21 out of the business. That's just a fact. And, you know,
22 they can talk about this or that but that's a fact in their
23 complaint and it shows they don't have a claim.

24 THE COURT: It shows they don't have a really good
25 plaintiff?

1 MR. CHERRY: Yeah, that's true.

2 THE COURT: All right. Thank you.

3 MR. CHERRY: Thank you.

4 THE COURT: While we are on that, let's do -- is it
5 Nippon? How do you say that?

6 MR. VICTOR: Nippon Seiki.

7 THE COURT: Nippon. You are on instrument panel
8 clusters, motion to dismiss all of the actions.

9 MR. VICTOR: Yes, Your Honor. Paul Victor of
10 Winston & Strawn representing the Nippon Seiki Company and
11 its two subsidiaries, NS International and NewSibian
12 Industries.

13 I will be arguing the motion to dismiss just the
14 direct-purchasers' complaint because as the Court was
15 apprised yesterday we have an agreement in principle with the
16 indirects -- both classes of the indirects so we will not be
17 arguing that motion today.

18 As Your Honor knows, the direct plaintiffs assert
19 far-ranging claims against the Nippon Seiki defendants, a
20 conspiracy period of at least as early of January 2001 and
21 including to the present involving every meter sold in the
22 United States during that time, and those claims rest
23 entirely on the fact that just one of the defendants,
24 Nippon Seiki, a Japanese company, entered into a plea
25 agreement that describes an entirely different conspiracy

1 involving less than two years and a few RFQs for a single OEM
2 customer.

3 So notwithstanding the Court's decision in wire
4 harness, we believe the CAC the directs have filed is
5 insufficient and should be dismissed. I'm not going to go
6 into Iqbal and stuff of that nature, you asked this morning
7 that we not go into it, I would like to refer to our briefs,
8 we have covered certain points in our brief in that regard.

9 First, let me talk about why the case should be
10 dismissed as against the subsidiaries. Under the Sixth
11 Circuit Carrier rule there's two ways that a plaintiff can
12 plead a plausible antitrust conspiracy claim against an
13 individual defendant that is also a subsidiary; one, by
14 pleading direct facts specifying the defendant's role in the
15 alleged conspiracy, or, two, by pleading facts to support a
16 determination that the subsidiaries are alter egos of the
17 parent.

18 We don't believe that either of those tests have
19 been met by the plaintiffs in this situation. Other than
20 generic group allegations that lump the defendants together,
21 the complaint is devoid of any direct factual allegations
22 describing how either subsidiary participated in the alleged
23 collusion notwithstanding the fact that the direct plaintiffs
24 had our DOJ documents prior to filing their CAC. And under
25 the total benefits and --

1 THE COURT: But in your plea, in Nippon's plea -- I
2 can't find where that is right now -- didn't it say in
3 connection or using its subsidiaries? Let me see if I can
4 find that word in here. Well, they say agreed to the full
5 truthful and continuing cooperation of the defendants and its
6 subsidiaries.

7 MR. VICTOR: The plea only deals -- as far as I
8 recall, Your Honor, with respect to the subsidiaries it
9 basically says that the subsidiaries would cooperate with the
10 Government with respect to further investigation.

11 So we think that under the Total Benefits and
12 Travel Agent rules that are applicable here in the
13 Sixth Circuit, not to mention Iqbal, that the plaintiffs have
14 to allege specific action that is taken by each defendant in
15 the collusive conduct. It is their obligation to plead such
16 facts showing each defendant's role. They don't do it here
17 with respect to the subsidiaries, so we don't think they
18 satisfy the first prong of the Carrier test.

19 That brings us then to the alter ego prong, the
20 second prong of the Carrier test, with respect to the
21 relationship between Nippon Seiki and its subsidiaries.

22 THE COURT: Well, they don't allege anything about
23 alter ego.

24 MR. VICTOR: That's the point, Your Honor, so they
25 have no basis to be in this case.

1 THE COURT: I agree with you there, there is
2 nothing -- we will see what they have to say about it.

3 MR. VICTOR: Okay. That makes that a fairly short
4 argument.

5 THE COURT: Okay. Thank you.

6 MR. VICTOR: Oh, I'm not finished, please.

7 THE COURT: Go to the third thing.

8 MR. VICTOR: I'm not quite finished. I would like
9 to also talk about the parent, Nippon Seiki, and why we think
10 this CAC should be dismissed as to the parent.

11 Yes, there is a plea agreement, yes, we acknowledge
12 that, but it cannot be that once you have a plea agreement
13 the plaintiffs have free reign to allege any conceivable
14 conspiracy even if it is vastly different from what is
15 covered by the plea agreement. There has to be some kind of
16 limitation on that.

17 What are they doing here? They are alleging this
18 10, 12-year conspiracy whereas we had a 22-month conspiracy
19 in the plea agreement. What are they doing here? They are
20 saying every meter we sold for 12 years -- for 10 years was
21 tainted by collusion, and they are saying that it affected
22 all customers that we sold to when the plea agreement just
23 alludes to one.

24 Now, it doesn't do it. We really don't understand
25 how that does it, and it is different from wire harness. In

1 the wire harness case when you sustained the claims against
2 the five defendants that entered into plea agreements, with
3 respect to three of them, I think it was Denso, Yazaki and
4 Furukawa, it covered the period from January 2000 to
5 February 2010, almost identical to the period that they are
6 alleging. It is very different from us. There was one other
7 company, Fujikura, where you did extend the plea period that
8 could be considered but here, again, as I'm saying, they are
9 asking you to take 22 months and say that's 12 years. It
10 is -- it just can't really be. The Supreme Court gave courts
11 Twombly and Iqbal as a tool to control what is going on. Why
12 should Nippon Seiki be subject to 12 years of discovery for
13 something like -- which is just no factual underpinning for.
14 We have a lot of trouble understanding that.

15 So with respect to -- well, I think I will stop
16 there, Your Honor. Thank you.

17 THE COURT: Thank you.

18 MR. KOHN: Your Honor, if I may very quick, I think
19 when you are referring to the Nippon guilty plea, there is
20 some more specificity with regard to the subsidiary issue.
21 It is page 4 of the Nippon guilty pleas, subparagraph D, the
22 conspiratorial meetings and conversations described above
23 took place in Japan, and instrument panel clusters that were
24 the subject of the conspiracy were sold to an automobile
25 manufacturer by a co-conspirator which is located in the

1 Eastern District of Michigan, and as we allege in the
2 complaint, that is the N.S. -- I think that's what we were
3 looking at.

4 In wire harness you sustained claims not only
5 against defendants who pled guilty to a shorter time period,
6 you upheld the complaints against defendants who hadn't pled
7 guilty at all and who still haven't pled guilty; Lear,
8 others. The guilty pleas again are admissions, they are
9 facts that are powerful, that place these complaints so far
10 outside the zone of the Twombly and the Travel Agents case,
11 et cetera. And there is this battle we have been fighting,
12 is it the safe harbor or isn't it?

13 If they join a conspiracy, even if they were only
14 active participants for some period of time, you are liable
15 for what went earlier. If you admit, you know, put your hand
16 on the Bible and swear to a felony, that is a fact that
17 provides the opportunity under Twombly for more discovery
18 that may lead to flesh out our complaint. The time period we
19 allege is consistent with another guilty plea.

20 THE COURT: Yeah, but they are claiming there their
21 own guilty plea is another conspiracy totally different
22 from --

23 MR. KOHN: And relying on the same verbiage that
24 was in the guilty pleas in wire harness, different time
25 periods, a manufacturer, a certain manufacturer, those are

1 building block facts that you look together with the other
2 facts, the market, the recidivist behavior, et cetera, to
3 sustain a complaint which we believe we have met in this case
4 as well. Thank you.

5 THE COURT: Thank you.

6 MR. VICTOR: Your Honor --

7 THE COURT: Reply? Yes.

8 MR. VICTOR: Thank you. Two very quick points.

9 First, this business about joining a conspiracy is
10 totally irrelevant to the issue before you. It has got
11 nothing to do with the proper allegations of a complaint with
12 respect to whether or not we committed collusion.

13 Secondly, the portion of the plea agreement that
14 they read to you, I think it is paragraph 4 --

15 THE COURT: 4.

16 MR. VICTOR: -- 4-D, the conspiratorial meetings
17 and conversations described above took place in Japan, and
18 instrument panel clusters that were the subject...were sold
19 to an automobile manufacturer by a co-conspirator which is
20 located in the Eastern District of Michigan. It says
21 co-conspirator, it doesn't say subsidiary. Thank you.

22 THE COURT: Who is the co-conspirator? All right.
23 Thank you.

24 Let me move on to the instrument panel, the
25 defendants' collective motion as to the end payors.

1 MS. FISCHER: Thank you, Your Honor.

2 Michelle Fischer from Jones Day on behalf of Yazaki, and
3 speaking today on behalf of all defendants.

4 Since I have the dubious honor of arguing the very
5 long motion I prepared a handout to help facilitate and
6 quicken up the argument. Can I approach the bench?

7 THE COURT: You may.

8 MS. FISCHER: Thank you. Whatever the appropriate
9 scope of this case might be it is certainly not what the
10 indirect-purchaser plaintiffs have alleged here, a claim on
11 behalf of every dealership and every buyer of every vehicle
12 of every make and model over anywhere from a period of
13 roughly nine years to more than a decade depending on which
14 complaint you look at.

15 You have already heard that the two pleas in the
16 complaints and even in their case the seven so-called
17 illustrative examples on which they rely in their complaints
18 are obviously much more limited than the
19 all-meters-everywhere, all-the-time conspiracy that they have
20 alleged.

21 Rest assured, Your Honor, defendants are not here
22 trying to argue that an antitrust conspiracy in a civil case
23 can be no broader than the conspiracy alleged in the plea,
24 but the Supreme Court has made clear that for a broader claim
25 like the indirect-purchaser plaintiffs to survive a motion to

1 dismiss they must allege enough factual matter taken as true
2 to suggest that the claimed broader conspiracy they are
3 alleging actually took place and that the defendants actually
4 entered into it.

5 So what that means here is that the plaintiff must
6 plead facts sufficient to support an alleged conspiratorial
7 agreement with respect to every meter sold to every OEM
8 during the relevant period. They haven't done so because at
9 a minimum plaintiffs here, unlike the plaintiffs in wire
10 harnesses, have not pled facts about the market, defendants'
11 shares within it or the breadth, or more accurately the lack
12 thereof, of defendants' meters customer bases.

13 So while our briefs detail a number of arguments
14 that the defendants continue to press, for today's purposes I
15 would like to start by focusing on the factual differences
16 between this case and wire harnesses. To do that I would
17 like to refer you to page 2 of your handout. I'm not going
18 to go over this in detail because you have already heard a
19 lot of this, but as you can see on the left-hand side --

20 THE COURT: Wait just a minute before you go on.

21 MS. FISCHER: Sure.

22 THE COURT: You have given us multiple copies of
23 this.

24 MS. FISCHER: I gave one for Molly.

25 THE COURT: Yes, that's what I wanted. Okay.

1 MS. FISCHER: If you turn to page 2 you will see
2 graphics on the left-hand side taken directly from the
3 end-payors' wire harness complaint. As heard from
4 Mr. Cherry, there were detailed factual allegations in wire
5 harnesses indicating that the market shares of the six
6 defendants was over 70 percent of the global wire harness
7 market. In terms of market concentration they made detailed
8 factual allegations that including Delphi, who was later
9 dismissed, four defendants had over 77 percent of the market
10 and even after Delphi was dismissed six of the defendants had
11 over 70 percent of the market. It was against that factual
12 background that this Court reasoned in wire harness that even
13 though the guilty pleas concerned only certain automobile
14 manufacturers it was plausible at the motion to dismiss stage
15 to infer that the conspiracy might have impacted all the
16 buyers, but as you can see from the right-hand side of the
17 page these plaintiffs allege absolutely nothing about the IPC
18 market or defendants' share of it. They allege that Denso is
19 the, quote, largest meter supplier.

20 You can look at paragraph 121 of the auto-dealers'
21 complaint and 84 of the end-payors' complaint, but they
22 allege nothing about how large Denso's share is or what the
23 combined shares of these three defendants collectively might
24 be. In fact, if you look at their complaints they allege
25 nothing at all about the size or dollar volume of Yazaki's

1 meter sales at all, they just make irrelevant allegations
2 about Yazaki's overall global automotive parts sales to
3 unspecified automotive OEMs. They also allege absolutely
4 nothing about the identity or market shares of the many
5 meters' competitors who are not defendants in this case and
6 who are not alleged to have conspired. For all plaintiffs
7 here have alleged the three defendants before this Court may
8 have less than 20 percent of the market, of a global market,
9 even less in the United States, and have faced very stiff
10 competition from dozens of other meters competitors rendering
11 it completely implausible that any collusion by these three
12 defendants as to a couple OEMs would have necessarily
13 affected prices to every OEM on every meter sale throughout
14 the period, but without allegations that these three
15 defendants controlled a substantial majority of the market
16 their claims that the defendants participated in a conspiracy
17 that affected every IPC to every OEM for every car model
18 since December 2002 is just not plausible, and then you add
19 to that the fact that meters are not fungible commodities.

20 An instrument panel cluster, which I also call a
21 meter, is designed for a specific car so that means that the
22 dashboard in, let's say, a Toyota Prius would look nothing
23 like and act nothing like the dashboard in a Cadillac or
24 Mercedes-Benz, and there is nothing in their complaint to
25 plausibly suggest therefore that a conspiracy with respect to

1 say a Toyota instrument panel cluster would have any impact
2 on the price of an instrument panel cluster for any other
3 vehicle, much less every other meter for every other vehicle.
4 Yet nonetheless the plaintiffs persist with this every meter
5 sale to every OEM claim.

6 The auto dealers, if you look at their complaint,
7 they go to great pains to identify the defendants' customers
8 but they are ambiguous as to whether those are even customers
9 for meters. And, in addition, they then go on to make claims
10 in their complaint on behalf of every OEM to which --

11 THE COURT: Let me stop you there. I just want to
12 clarify this. For the instrument panel clusters, which you
13 call meters as another name, are there -- I mean, does each
14 model have different actual -- the actual meters themselves
15 have different sizes or if they made a meter for one model
16 could it be used in other models so the dashboard would be
17 different?

18 MS. FISCHER: Typically, Your Honor, they are
19 customized by vehicle, so you would have an instrument panel
20 cluster for a Prius that would differ from an instrument
21 panel cluster for a Honda Accord, a Chevy Cruze, et cetera,
22 so they are different.

23 Their complaint goes on to -- I'm talking about the
24 auto dealers, to assert claims on behalf of OEMs to which
25 they don't even list as customers of any of the defendants in

1 this case. Simply put, without facts to support the broader
2 conspiracy, at least those auto dealers who do not allege
3 that they bought from cars or stand alone IPCs from the two
4 OEMs that are actually identified in their complaints they
5 have stated no claim, and neither have any of the end payors,
6 none of whom have alleged anything about what they bought in
7 terms of the make or model of any car, they have never said
8 whether they even bought a stand-alone repair part at all.

9 Speaking of repair parts, their repair part claim
10 is even one giant step further removed from the completely
11 implausible global conspiracy regarding sales of all IPCs to
12 all OEMs. Plaintiffs allege no facts at all about
13 defendants' market shares in any market for repair parts, who
14 any of the other repair part suppliers are, how pricing of
15 repair parts relates in any way to pricing of parts for new
16 cars. Your Honor, telling us as they do in their opposition
17 brief that, quote, it is difficult to imagine that a
18 conspiracy with respect to instrument panel clusters for new
19 cars would not also affect repair parts is not pleading
20 facts, it is just saying, gee, it is difficult to imagine.

21 These pleading failures require dismissal then of
22 their complaints on two different grounds. First, their
23 complaints have to be dismissed under Twombly and Iqbal
24 because those cases make very clear that to survive dismissal
25 on a motion to dismiss they must plead sufficient factual

1 content to allow this Court to draw the reasonable inference
2 that the defendant is liable for the misconduct alleged.
3 What is the misconduct alleged? This all IPC all the time
4 conspiracy.

5 So what have they pled? They pled to IPC related
6 guilty pleas by Yazaki and Nippon Seiki, they pled several
7 examples of illustrative conduct which are within the scope
8 of the pleas and which relate only to two OEMs, so they don't
9 support the broad all-OEM conspiracy that they have claimed.
10 They refer to pleas by other -- the other defendant and other
11 companies that have nothing to do with instrument panel
12 clusters, and they make reference to a couple governmental
13 investigations elsewhere. The key question then is all of
14 that is within the scope of the pleas so the key question
15 then is what else have they alleged to allow this Court to
16 draw the reasonable inference that the broader conspiracy can
17 survive?

18 In wire harnesses, as we said before, this Court
19 held that that gap was filled by the market facts, and that
20 is completely consistent with several other cases which
21 upheld Twombly challenges. For example, in aftermarket
22 filters the plaintiffs' conspiracy claim survived a Twombly
23 challenge because the plaintiffs allege that the defendants
24 were the leading manufacturers, that four of them controlled
25 80 percent of the market.

1 THE COURT: We have already gone over those cases
2 so let's move along.

3 MS. FISCHER: And Chocolate is another for the
4 Court's reference.

5 THE COURT: I like the Chocolate but that's okay.

6 MS. FISCHER: But the indirect-purchaser plaintiffs
7 here have not alleged any of those market things including no
8 homogenating, no fungibility and no disperse buyers.

9 Since they have not connected the dots between the
10 facts they have pled and those relating to the broader
11 conspiracy they allege, their complaints fail Twombly and
12 must be dismissed. For the same reason, Your Honor, the same
13 pleading failures require dismissal of their complaints for
14 lack of standing, both Article 3 and antitrust. In other
15 words, they have failed to plead facts even reasonably
16 suggesting that every one of them suffered injury at all,
17 much less injury that would be fairly traceable to or that
18 approximately resulted from the defendants' conduct, which is
19 required for both Article 3 and antitrust standing, and for
20 that -- those reasons their complaints fail in their entirety
21 for this reason as well.

22 I have obviously talked to this point about the
23 overall failures of their complaint. I would like to focus a
24 little bit now on the specific antitrust consumer-protection
25 and unjust-enrichment claims, if I could. Obviously we also

1 believe and have argued that they are also deficient on
2 many -- for multiple reasons. If you look to page 3 of the
3 handout I have listed many of the reasons why. Obviously I
4 don't intend to address all of them today, Your Honor, I
5 certainly can't.

6 I would like to touch on the ones that are
7 highlighted in blue on your slide starting with a couple pure
8 questions of law including the fact that as businesses auto
9 dealers lack standing to bring consumer protection claims in
10 D.C. and Missouri. Now, the consumer-protection laws in both
11 D.C. and Missouri clearly do not permit those who made
12 purchases for commercial purposes to bring claims. Instead
13 they only permit claims by those who purchased or leased
14 purely for personal, family or household purposes.

15 In paragraphs 23, 51 and 102 of their complaint the
16 auto dealers specifically plead that they bought IPCs for
17 their repair and service businesses and cars to sell to
18 customers. These are purely commercial, not personal
19 purposes.

20 The Court already ruled in wire harnesses that the
21 plain language of the Missouri statute precludes the auto
22 dealers' claim because it, just like the D.C. statute that is
23 now before the Court, limits the claims to the actual
24 customers, and we simply ask that the Court apply the exact
25 same legal reasoning to the D.C. claim as well and, of

1 course, reach the same conclusion with respect to Missouri.

2 THE COURT: And the same as we go on with the
3 unjust enrichment I take it that the Court did with the wire
4 harness?

5 MS. FISCHER: Yes, exactly. With respect to the
6 efforts to bring class claims under the antitrust laws of
7 Illinois and the consumer-protection laws of South Carolina,
8 I would like to touch on this a little bit because the Court
9 split the difference in wire harnesses. I learned at 10:30
10 this morning that although the end payors' opposition brief
11 says they were dropping their Montana consumer-protection
12 claim, they meant to say they were dropping their Montana
13 antitrust claim, so the same argument I'm about to make also
14 applies to their Montana consumer-protection claim. My
15 handouts don't address it because I didn't know that it was
16 still on the table.

17 In any event, as you can see if you turn to the
18 next page, page 4, the plain language of both the Illinois
19 Antitrust Act and South Carolina's Unfair Trade Practices Act
20 make clear that claims under those acts may not be pursued as
21 class actions. The auto dealers, however, nonetheless argue
22 by reference to the non-controlling portion of the Supreme
23 Court's opinion in a case called Shady Grove that these
24 express class bars are not enforceable in the wake of that
25 opinion, but that is just not true. Justice Stevens'

1 opinion, which is the controlling Shady Grove opinion under
2 the narrowest grounds rule, is shown on page 5. That opinion
3 makes clear that Shady Grove is not a blanket ban on
4 enforcing state class-action bars in diversity actions.
5 Rather that case held only that pure state procedural rules
6 will be displaced by federal procedure rules like Rule 23 in
7 diversity actions. Where, however, the state procedure rule
8 is so intertwined with the substantive right or remedy that
9 it actually defines the right it will continue to be
10 enforced. For that reason, as you can see from the next
11 page, page 6, several courts have found that the class action
12 bars in the Illinois Antitrust Act and South Carolina's
13 Unfair Trade Practices Act survive Shady Grove because they
14 are so intertwined with the rights and remedies in those
15 statutes that they actually function to define the scope of
16 the substantive right.

17 This Court, in fact, already found that the
18 Illinois Antitrust Act class claim was precluded and barred
19 and dismissed it in *wire harnesses* applying the analysis set
20 forth in *Digital Music* which reached the same result.

21 Now, frankly, the analysis in *Digital Music* was
22 that the ban should continue to be enforced because it was
23 contained in the same paragraph of the same statute as the
24 substantive antitrust right. That analysis actually applies
25 perhaps with even more force to the South Carolina

1 consumer-protection claim because that bar contains not only
2 in the same paragraph but in the same sentence with the bar
3 limiting the right as it is granted, and the same thing is
4 true, Your Honor, under the Montana Unfair Trade Practices
5 Act claim that end payors have revived today.

6 We are, of course, aware, Your Honor, that you
7 ruled against defendants' position in wire harnesses with
8 respect to South Carolina, but the leading reason you gave
9 for not enforcing the bar there was that defendants had
10 failed to cite any post-Shady Grove case law specifically
11 addressing the South Carolina Consumer Protection Act, that
12 is no longer true. In November of 2012 after the wire
13 harness briefing was over the District of South Carolina
14 issued a decision called *In re: MI Windows and Doors*, that
15 dismissed a claim under the Consumer Protection Act of South
16 Carolina specifically holding that it was not persuaded, that
17 Shady Grove required the class-action bar to be trumped by
18 Rule 23. That case postdates Optical Disc Drive, which is
19 the only case that the plaintiffs cite, and unlike Optical
20 Disc Drive actually contained substantive analysis of Shady
21 Grove and also is consistent with the Digital Music analysis
22 that the court applied in reaching its Illinois Antitrust
23 Act.

24 THE COURT: That's the only other newer case was
25 that --

1 MS. FISCHER: That's the only case, it cites to a
2 couple other cases within it but those other cases, Your
3 Honor, did not specifically discuss Shady Grove.

4 So I would like to turn now if I could -- sorry.
5 So where we want to go with that is we believe the
6 class-action bars should continue to be enforced in South
7 Carolina, Illinois and Montana, and those claims should be
8 dismissed, pure issue of law.

9 I would like to turn now to an argument that
10 actually applies to eight different states though I won't
11 deal with all of them. Specifically I want to turn to the
12 requirement to adequately plead a sufficient nexus with
13 interstate commerce.

14 Now the plaintiffs concede and the Court has
15 already recognized that the California, New York and
16 North Carolina consumer-protection statutes and the D.C.,
17 Mississippi, Nevada, New York, North Carolina and
18 West Virginia antitrust statutes all require plaintiffs to
19 plead a sufficient nexus with interstate commerce, but even
20 though all of these states have a nexus requirement you can
21 see from page 7 of the handout that the nexus requirement as
22 well as what satisfies it varies not only by state but as
23 New York and North Carolina show even by claim within the
24 state. In other words, the nexus requirement is different
25 under North Carolina antitrust and consumer protection law by

1 way of example.

2 So whether the state law requirements are satisfied
3 are questions of state law and as laid out on the next page,
4 page 8, and as this Court already recognized in wire
5 harnesses, both the Supreme Court and the Sixth Circuit have
6 said that when an issue is one of state law it should be
7 assessed by looking to state cases or to the extent state
8 cases are not available at least to federal cases construing
9 that particular state's laws. In other words, there has to
10 be a state-by-state analysis and since we don't have time I
11 just want to touch on a few examples.

12 Let's look at first Mississippi antitrust law. To
13 allege a viable claim under Mississippi antitrust law the
14 indirect purchasers must allege, quote, at least some conduct
15 by defendants performed wholly within Mississippi. This
16 requirement actually derives from a Mississippi Supreme Court
17 case called Standard Oil which held that for an act to be
18 punishable under the Mississippi Antitrust Act the act must
19 be accomplished by at least one transaction that was
20 accomplished wholly interstate.

21 The Court found that requirement satisfied in
22 Standard Oil because plaintiffs allege that defendants sold
23 and distributed products within Mississippi. Here plaintiffs
24 do not allege any conduct by defendants in Mississippi, nor
25 do they distinguish defendants' cited cases. Instead, what

1 they do is wrongly claim that three cases, specifically GPU2,
2 In re: New Motor Vehicles and LCD2 I believe it is, supports
3 the sufficiency of their allegations. But as you can see
4 from the next slide -- or next page, Your Honor, all of those
5 cases involved allegations of in-state sales either by the
6 defendants or their co-conspirators, and so did Standard Oil,
7 as I just said.

8 They make no similar allegations here. The only
9 case they cite that held that allegations like theirs were
10 sufficient to satisfy the Mississippi antitrust interstate
11 nexus requirement was LCD2, but if you look at that case that
12 case actually relied on GPU2, Infineon and Standard Oil, all
13 of which required an allegation of some in-state misconduct
14 by the defendants. Respectfully, Your Honor, those were the
15 same cases to which this Court pointed in wire harnesses
16 but --

17 THE COURT: Counsel, you are going to have to wind
18 up now.

19 MS. FISCHER: Okay. But for the reasons -- but
20 those cases really don't support that conclusion. The
21 reason -- the best analogy I can draw is like to a recipe say
22 for bread; you need flour, water and yeast to make bread. If
23 you don't have all three of those ingredients you've got
24 something but you don't have bread. And in these cases they
25 all say if you have these ingredients then you get to

1 conclude that the interstate nexus requirement is satisfied.
2 They don't have all of those ingredients in any of those
3 cases, and for that reason their Mississippi claim fails.

4 Your Honor, I have several more examples. If there
5 is anything in particular you want me to address I can or I
6 can just --

7 THE COURT: No, you don't have to because I have
8 read it and I will go over it again.

9 MS. FISCHER: Thank you.

10 THE COURT: I guarantee you. Okay. Response?

11 MR. BURNS: Good afternoon, Your Honor.

12 THE COURT: Good afternoon.

13 MR. BURNS: Again, Warren Burns from Susman Godfrey
14 for the end payors. I will be joined by a couple other
15 colleagues in a moment. There's a lot to get through here.
16 I will be covering the Twombly response.

17 Your Honor, we heard this morning that there are
18 now I believe 27 different auto parts cases before this Court
19 involving multiple often overlapping defendants. Absent
20 merits discovery, the full scope, the particulars of the
21 scope of the individual conspiracies will have to be
22 discovered and it would be an exaggeration to say we know
23 that full scope at this moment.

24 In announcing the latest round of guilty pleas and
25 fines Attorney General Holder made one thing clear, and that

1 was the Department of Justice's investigation had uncovered
2 conspiracies that touched practically every major make of
3 cars sold in the United States. We are not in Denmark, Your
4 Honor, but to paraphrase the Great Bard, there is something
5 very, very rotten in the auto parts industry that cuts across
6 all of these defendants and touches every major manufacturer
7 of cars that sell here in the United States.

8 Yet the consistent refrain we hear from the
9 defendants and we heard so stridently just a moment ago is
10 that the plaintiffs have got it wrong. The allegations of
11 overarching conspiracies are far too broad, and that the
12 conspiracies alleged simply are not plausible. This Court
13 properly rejected that argument in wire harness, and the
14 dissimilarities between wire harness and the IPC case are
15 very few and of no moment here. Respectfully, this Court
16 should reject those arguments again.

17 The major thrust of the argument the Court heard
18 today centered on the lack of market allegations to support
19 plaintiffs' view of the conspiracy in this case. It is not
20 true, Your Honor, to say that the end-payor plaintiffs made
21 no allegations that the market was conducive to a broad
22 conspiracy. In fact, I would point Your Honor to pages 15
23 and 16 in the end-payors' complaint where we do make
24 allegations that the instrument panel clusters market has
25 high barriers to entry, that there is intranslacticity of

1 demand for instrument panel clusters in the market, both
2 market characteristics that support a broader influence of
3 conspiracy in this case.

4 But beyond that, Your Honor, what do we have? We
5 have two guilty pleas by defendants in this action who pled
6 guilty directly to fixing the price of IPCs. We have a third
7 defendant's participation in conspiratorial conduct in the
8 automotive parts industry in which, we point you to on pages
9 3 and 4 of our opposition brief, have been held by courts to
10 support a broader influence of conspiracy. We have the
11 likely existence of a cooperating defendant in this case,
12 that's page 21 of the complaint. And then we have provided
13 Your Honor numerous instances of conspiratorial conduct
14 involving all three defendants.

15 Your Honor, these are facts that are entirely
16 similar to those you saw in the wire harness case and support
17 the inference of a broader conspiracy here. We are not bound
18 by the narrow conspiracies or the narrow allegations or
19 agreements in plea agreements, we have pointed you to support
20 for that. We will stand on these facts as supporting the
21 conspiracy alleged.

22 Unless there are further questions on this point I
23 will turn the floor over to one of my colleagues.

24 THE COURT: Okay.

25 MR. WILLIAMS: Good afternoon, Your Honor.

1 Steve Williams for the end payors.

2 So we have divided up a few of these parts but we
3 will try to be brief. Before I came I read the transcript
4 from the last argument, of course I read the order of the
5 Court, and while the argument was going on I tried to read
6 what counsel gave you, and I've got to say it looks a lot
7 like what they gave you last time. And I was reading your
8 order as they were arguing this and I looked at, for example,
9 this intrastate nexus argument and you ruled on all of that
10 last time, every single one. And all they are really saying
11 is you didn't specifically say your California plaintiff who
12 you're claiming damages for, quote, purchased in California.
13 Well, they did. So it sounds like the argument really is
14 they want us to go back and amend to say that, and that seems
15 to me to be an utter waste. Those are the claims and that's
16 what discovery is for. Beyond that there is really little
17 new here from the argument last time.

18 THE COURT: I was going to ask what is new in the
19 state claims -- in these claims?

20 MR. WILLIAMS: In our claims, nothing, and in
21 reading all the papers I couldn't find anything different.
22 And in hearing the argument this morning the only thing I
23 heard different I think was that South Carolina has some case
24 that might address the Shady Grove issue. For end payors we
25 are only affected by this to the extent that it deals with

1 Montana, that's a South Carolina case so it doesn't affect
2 Montana, and the Court already ruled on Montana last time.
3 So with all respect for all of these notes and all of the
4 papers and all the presentations, I can't find anything new
5 or different as to the end-payor claims that would lead to
6 any different result from the wire harness case.

7 THE COURT: Okay. Thank you.

8 MS. FISCHER: May I address two points, Your Honor?

9 Oh, I'm sorry.

10 MS. ROMANENKO: Good morning, Your Honor.

11 Victoria Romanenko from Cuneo, Gilbert & LaDuka for the
12 dealership plaintiffs, and I am also splitting this oral
13 argument with Jonathan Cuneo, who I will invite up right
14 after my --

15 THE COURT: Wait a minute. How many of you are
16 doing this? I mean, come on.

17 MS. ROMANENKO: We will be very brief.

18 THE COURT: Okay.

19 MS. ROMANENKO: So to start with we heard some
20 criticisms of our complaint --

21 THE COURT: Actually there was a lot of criticism.

22 MS. ROMANENKO: There were many criticisms, and
23 what we heard was that defendants didn't understand our
24 claims, so here is a sample paragraph from our complaint.
25 This one concerns Landers. Plaintiff Landers is an Arkansas

1 corporation with its principal place of business in
2 Little Rock, Arkansas. Plaintiff Landers is an authorized
3 Toyota dealer who sells Toyota-brand vehicles containing
4 instrument panel clusters manufactured by one or more of the
5 defendants or their co-conspirators as well as instrument
6 panel clusters manufactured by one or more of the defendants
7 or their co-conspirators. During the class period Landers
8 purchased vehicles containing instrument panel clusters
9 manufactured by one or more defendants or their conspirators.

10 They say we don't know what they bought. Well, we
11 bought replacement IPCs and vehicles containing IPCs. We are
12 authorized dealers of the OEMs. We -- in our complaint --

13 THE COURT: From whom did you buy them?

14 MS. ROMANENKO: From whom did we buy?

15 THE COURT: Yes.

16 MS. ROMANENKO: Generally from the OEMs. We are
17 authorized dealers of the OEMs, so we sell their product, we
18 sell their vehicles, we sell their replacement parts. I
19 don't think that defendants are at all confused about what
20 our role is here or what we purchased. We set out for every
21 plaintiff what kind of dealer they are and what it is that --
22 what OEM they are authorized to deal for, and the fact that
23 both replacement parts and vehicles are involved.

24 We also set forth in our complaint the OEMs that
25 the defendants supply. Just to give you a quick example, we

1 say Denso's main customers include Honda, Toyota, General
2 Motors, Mercedes, BMW, Chrysler, Subaru, Mazda, Suzuki,
3 Mitsubishi, Nissan, Kia, Hyundai and Volvo among others.
4 That's a long list. And we also list the OEMs for the two
5 others. Each one of our dealers sells vehicles that are made
6 by an OEM that is supplied by one of these defendants. We
7 have created a connection. They cannot say that we didn't.

8 As far as the argument that oh, only certain OEMs
9 were affected by their conduct therefore if those OEMs are
10 not the ones that we bought from then we are not injured,
11 they made that argument last time too.

12 Ms. Sullivan stated, I think this is page 66 of the
13 transcript from December 6th, she said if you look at the
14 individuals who pled guilty you can see that the sales
15 departments they worked in were Honda, Toyota and Subaru. It
16 is not plausible that a person who bought, let's say, a Chevy
17 was necessarily impacted by any of the defendants' behavior
18 that they pled guilty to. This Court did not limit the wire
19 harness case to Honda, Toyota and Subaru. This Court let us
20 take discovery.

21 So in this instance we respectfully request the
22 same thing, and I won't repeat what counsel said but it is
23 clear from a number of the other pleas that this is not any
24 sort of limited conspiracy. Furukawa, who is a co-defendant
25 with Yazaki and Denso, pleaded to fixing prices to an

1 unlimited number of OEMs. In OSS by my count, a case where
2 there are two German OEMs and five Japanese OEMs who have
3 been identified as victims, Yazaki's plea agreement doesn't
4 even state which OEMs were involved, it says certain. That's
5 the same thing it said in wire.

6 To respond to what Ms. Fischer stated regarding our
7 allegations about the market, you can anticipate I'm going to
8 say they are not appreciably different from what we had in
9 the wire harness case. We plead intransitivity of demand,
10 high barriers to entry, market concentration. In fact, we
11 say only a handful of manufacturers supply instrument panel
12 clusters to installation in vehicles sold in the U.S.
13 Certain OEMs purchase instrument panel clusters for use in
14 U.S. vehicles only from the three defendant groups. It
15 cannot be said that we don't plead concentration, that we
16 have no allegations about market share. We do plead the
17 allegations and, I think as Ms. Fischer mentioned, we state
18 that Denso is the world's largest IPC supplier.

19 Ms. Fischer stated okay, but this is not -- this is
20 only partially based on what is in our complaint, she stated
21 IPCs are specially designed for specific cars, that's in the
22 wire harness complaint too. And our complaint doesn't say if
23 you design IPCs for Honda you can't do it for Chevy, but
24 that's something that is coming from outside, it is not in
25 the four corners of our complaint.

1 Just one moment. I'm almost finished here.

2 One difference that we would like to draw Your
3 Honor's attention to is that unlike in the wire harness
4 complaint we have also alleged specific instances of
5 collusion and you can -- I won't say what they are because it
6 is confidential but I will just refer you to paragraphs 145
7 through 151 of our complaint. This complaint is even more
8 specific and even stronger than our complaint in the wire
9 harness case. I think there was a mention of unjust
10 enrichment and I will just quickly cover it generally just to
11 dispel the notion that we didn't change our pleadings based
12 on attacks that were made in wire harness. Actually, we did.
13 We stated in our complaints -- the dealership plaintiffs
14 stated in their complaints that we seek damages under the
15 unjust enrichment laws of the indirect purchaser states. Can
16 you look at paragraph 275 --

17 THE COURT: What law are you using for the unjust
18 enrichment?

19 MS. ROMANENKO: The state law of the states where
20 we claim consumer-protection claims as well as antitrust
21 claims. So we are not using the law of any state that
22 doesn't permit an indirect-purchaser action, we are limiting
23 our unjust-enrichment claims to those states where we also
24 have statutory claims.

25 THE COURT: Have a consumer protection or --

1 MS. ROMANENKO: And if you will indulge me for one
2 more second, I will point you to paragraph 275 of our
3 complaint because we heard the attacks and we wanted to be
4 certain that we modified accordingly. So in paragraph 275 we
5 stated plaintiffs bring this claim under the laws of all
6 states listed in the second and third claims, and second and
7 third claims are the ones that list the antitrust statutes
8 and the consumer-protection statutes.

9 THE COURT: Okay. Anything else?

10 MS. ROMANENKO: I believe that is it, and I'm going
11 to turn it over to John Cuneo.

12 MR. CUNEO: I think my first comment, Your Honor,
13 will be welcome, and that is that in reviewing the papers
14 last night and listening to Ms. Fischer today the auto
15 dealers are prepared to withdraw the D.C. consumer
16 protection -- not the Antitrust Act claim but the Consumer
17 Protection Act claim that Ms. Fischer mentioned this morning.

18 Now, I'm also prepared if Your Honor wants to hear
19 it to argue and talk about the South Carolina class action
20 bar. However, that has been previously decided by this
21 Court, we think it should adhere to its prior opinion.

22 And as a general matter in terms of unjust
23 enrichment, I would say I guess five words --

24 THE COURT: She just argued.

25 MR. CUNEO: Okay. Cardizem by Judge Edmonds. The

1 Cardizem opinion discusses these issues thoroughly in and
2 out. The opinion has a very, very crisp understanding of the
3 issues. I would respectfully refer the Court to that.

4 THE COURT: All right. Reply?

5 MS. FISCHER: Just a few quick points, Your Honor.

6 I think I will start with unjust enrichment since we just

7 heard about that. The end payors in wire harnesses had

8 already identified the states under which they brought claims

9 but identifying the states alone is not enough and that's

10 because the states have such widely disparate

11 unjust-enrichment laws. Perhaps Aftermarket Filters said it

12 best, there the court said finally in Count 2 plaintiff's

13 attempt to bring a national unjust-enrichment claim based on

14 the laws of all the 50 states, excluding Ohio and Indiana but

15 including Puerto Rico and D.C., given admitted differences in

16 the states' legal theories of unjust enrichment, it is

17 impossible for this claim to be brought as a nationwide class

18 and therefore claims must be brought under the specific laws

19 of each state. The complaint fails to plead the required

20 factual basis of an unjust-enrichment claim on a state by

21 state basis, accordingly Count 2 is dismissed.

22 That's exactly what this Court already did in wire
23 harnesses, and we submit that the same exact result is
24 warranted here.

25 Secondly, obviously I didn't have a chance to

1 address Montana authority with respect to the Shady Grove
2 class-action bar but there is authority from within this
3 district, it is in a footnote in Packaged Ice.

4 THE COURT: Wait a minute. A footnote in what?

5 MS. FISCHER: In Packaged Ice, in footnote 4 that
6 says although the court has already dismissed the Montana
7 claims on other grounds, after Shady Grove it would appear
8 likely that the Montana Unfair Trade Practices Act class bar
9 would continue to be enforced because it is contained
10 basically within the same paragraph of the statute that
11 creates the substantive rights, so the exact same Digital
12 Music analysis was applied there admittedly in dicta, Your
13 Honor, because the claim had already been dismissed on other
14 grounds.

15 In addition, I just want to touch on something that
16 Mr. Williams said as well as one of the auto dealer points.
17 None of our arguments against the auto dealers concern or
18 center upon some alleged failure to say where they bought
19 their cars or IPCs. We fully acknowledge that the auto
20 dealers pled where and what they bought. Those arguments
21 apply only to the end payors and are very, very critical in
22 assessing the interstate nexus arguments. Mr. Williams
23 thinks it is a mere technicality that they didn't plead where
24 they bought but it is not, and I think it is a critical
25 omission. They are just not entitled to an inference that

1 they bought the car or the instrument panel cluster in the
2 state where they reside, and let me explain why.

3 They allege a conspiracy that extends roughly nine
4 years. They do not allege when they bought their cars. Even
5 assuming it will be fair, and I don't think it would be fair,
6 but even assuming it would be fair to infer that a consumer
7 bought his car in the state in which he resides the fact that
8 an end payor lives somewhere now at the time that the
9 complaint was filed says nothing about where he was living at
10 the time that he bought his car or his repair part if he ever
11 bought one.

12 Secondly, Your Honor, a car is nothing like a
13 routine repeat purchase like groceries or gas that you could
14 expect a person to buy locally. Instead you heard I think
15 Mr. Kohn say cars are, you know, infrequent buys, they are
16 big-ticket, infrequent purchases. For that reason it is just
17 not uncommon for people to go out of state to take advantage
18 of either lower tax rates or better prices, and they are just
19 not entitled to a contrary inference. They easily could have
20 pled this information, Your Honor. They certainly know what
21 cars they bought, where they bought them and when. None of
22 that information depends in the least on anything they needed
23 from defendants. That was a deliberate choice and they
24 should be held to the consequences of that choice.

25 THE COURT: Okay.

1 MS. FISCHER: Thank you.

2 MR. GANGNES: Your Honor, can I make a brief
3 comment?

4 THE COURT: Sure.

5 MR. GANGNES: Your Honor, Larry Gangnes from
6 Lane Powell for Furukawa.

7 I wanted to correct a possible misimpression on the
8 record. Ms. Romanenko misspoke when she mentioned Furukawa
9 in the course of her argument about instrument panel
10 clusters. Furukawa does not make and has not sold instrument
11 panel clusters to OEMs. It's a defendant in the wire harness
12 cases but it's not a defendant in the IPC cases.

13 THE COURT: Thank you.

14 MR. GANGNES: Thank you.

15 THE COURT: Without your notes directly on, it's
16 hard to keep track of who does what here, I tell you.

17 Okay. Let's go on to the collective defendants'
18 motion to dismiss direct purchasers -- direct-purchaser
19 plaintiffs in the heater control panel.

20 MR. CHERRY: Your Honor, again, I'm Steve Cherry
21 with Wilmer Hale. I'm representing Denso, but for this
22 purpose I will be speaking for all of the defendants.

23 I will try not to repeat things that were said in
24 the earlier argument, there's some overlap obviously in the
25 legal arguments.

1 THE COURT: Okay.

2 MR. CHERRY: Okay. Unlike ACAP, which we have just
3 described in the instrument panel cluster case, which despite
4 the disconnect with the conspiracy alleged at least supplied
5 instrument panel clusters to an actual auto manufacturer at
6 some point in its existence. These two plaintiffs here never
7 made automobiles and they were never suppliers to any
8 automobile maker. Instead, both, they are manufacturers of
9 motor homes, one of which like ACAP went out of the business
10 at some point.

11 They purport to assert claims against three
12 defendants, Sumitomo, Denso and Tokai Rika. And as in wire
13 harnesses, they do rely on guilty pleas by certain of the
14 defendants, in this case Denso and Tokai Rika, but unlike in
15 wire harnesses where it has been noted there were pleas as to
16 certain OEMs, some of which were not identified, here we know
17 that both pleas go directly to Toyota, that's all there is.
18 There are two pleas solely for Toyota.

19 Based on that they allege that, well, then there
20 must have been a conspiracy that affects every sale of every
21 heater control panel to every buyer of every kind in the
22 United States. There's just no facts to support that, Your
23 Honor. There are again the two pleas about Toyota and
24 nothing else. The facts that were essential to your decision
25 in bridging the gap between the disparate pleas and this

1 notion of an overarching conspiracy in wire harnesses, those
2 facts are just not present here. There you relied very much
3 on actual factual allegations about market concentration,
4 about the market power of the defendants, and there was an
5 actual effect on prices alleged. There was an allegation
6 that prices had gone up even though the cost of inputs had
7 stayed the same, which they allege was unusual and suggestive
8 of a conspiracy affecting prices across the board.

9 None of that is here. There is no allegation of
10 the market concentration of how many suppliers there are, of
11 what suppliers there are other than the defendants. They
12 indicate that there are others but they don't say who they
13 are or what their market shares are. They don't say what the
14 defendants' market shares are. What they do say is on
15 information and belief the defendants and some unspecified
16 number of unspecified alleged co-conspirators may make up a
17 majority of the market. Well, that's even worse than a
18 conclusory assertion, that's just plaintiffs' utter
19 speculation. We don't know who these supposed alleged
20 co-conspirators are, how many they are, what their market
21 share is. We can't respond to that. I don't know who they
22 are talking about.

23 And so for all we know from what they have alleged
24 defendants may have a very small market share with no market
25 power at all and there may be dozens of competitors out there

1 competing fiercely for sales of HCPs. There's no facts to
2 the contrary, there is no facts at all.

3 THE COURT: I assume you know who those competitors
4 are?

5 MR. CHERRY: I don't know who they are referring
6 to. We know that there are a number of other competitors
7 that aren't named here, we don't know if they are alleged to
8 be our co-conspirators or not, and they don't say. So those
9 facts that were in wire harnesses that were illustrated,
10 their charts and their diagrams, are completely absent here.

11 Again, they also alleged an effect on pricing.
12 Remember pricing going up with input staying the same, none
13 of that here. We don't know if prices went up, stayed the
14 same or went down. We don't know if inputs went up, stayed
15 the same, went down. None of that is present here.

16 Another very important distinction in this case,
17 unlike wire harnesses, in wire harnesses they at least
18 alleged that they bought from the defendants. Here all they
19 allege is they bought from the defendants or again some
20 unidentified alleged co-conspirator. We don't even know not
21 only who they did business with among the defendants, we
22 don't know who they did business with at all. Again, how are
23 we supposed to respond to that or assess that claim. So
24 again, the key facts here that you found to be important in
25 wire harnesses just are completely missing here.

1 The other thing is this notion of fungibility which
2 is essential to their theory that a price to one would affect
3 the price to all. Again, heater control panels, actually
4 like instrument panel clusters, are a highly customized
5 product. Just think of the various automobiles you have been
6 in and how different the dashboards are, how complicated, you
7 know, how high-end some are, how simple others are. That's
8 why they source these things three years ahead of time
9 because it takes a lot of time to develop them. That's why
10 the same OEM -- sorry, supplier when they are awarded keeps
11 the business over the life of the vehicle because there's a
12 lot of development to make these things. So obviously some
13 very important differences between this case and wire
14 harnesses, Your Honor.

15 Thank you.

16 THE COURT: Thank you.

17 MR. KOHN: May it please the Court, Joseph Kohn for
18 the direct purchasers.

19 Your Honor, these are Rule 12 motions. The
20 defendants have defenses, and we are starting to hear some of
21 them. Your Honor heard at the wire harness hearing the same,
22 they have arguments and defenses as to the scope of the
23 conspiracy, the amount of damages, et cetera, but these are
24 not issues under Twombly. I know there is a doctrine in the
25 bar and both plaintiffs and defendants and we have been on

1 both sides about firing a shot across the bow to put down a
2 marker to lay some of these arguments out there. Our
3 complaint, paragraphs 71 and 72 of the HCP complaint, makes
4 the allegations that again the OEM bid prices become a price
5 that is used in the market. It is the same argument that we
6 alleged in wire harnesses. Paragraph 72, defendants engage
7 in a single price-fixing conspiracy involving HCPs that
8 impacted not only the multiple bids submitted to OEMs but
9 also the prices paid by all other direct purchasers of HCPs.
10 These plaintiffs are purchasers who are manufacturing
11 vehicles that are on the road. They are direct purchasers.
12 They stand closer in the shoes of the -- they are more akin
13 to the OEMs than the supplier plaintiff direct purchasers who
14 are the proposed class representatives in wire harness and in
15 IPC.

16 Three defendants, two of the three have pled
17 guilty. Again, I would submit a stronger factual -- for the
18 long class period. I would submit a stronger factual record
19 than what we had in wire harness where we had a number of
20 defendants who hadn't been indicted, hadn't pled at all.

21 Your Honor had raised the issue this morning about
22 the Government's cooperation amnesty programs, and we can
23 draw conclusions or inferences with respect to that. These
24 products are no more customized than our wire harness
25 products. We have the same argument. A wire harness in a

1 Toyota isn't going to fit into the Cadillac, the wiring
2 system around the side, that is not the issue, it is the
3 underlying plastic component that we contend that is a
4 commodity and whether you put a Mercedes knob on the front
5 you see for \$50 or you put a Toyota knob on for \$8, when you
6 look behind the dashboard the plastic components are the
7 same, that's what these folks have got together and rigged
8 the bids on, and that's again what the theory that is alleged
9 is the price in the market.

10 These are clearly direct purchasers, they purchased
11 throughout this time period. Again, in Twombly the Supreme
12 Court said that plaintiffs' antitrust complaints have become
13 a formulaic recitation of agreement, collusion, and I think
14 there is a point where now six and-a-half years after Twombly
15 and we see where the body of the law is with respect to
16 cartel cases, with respect to guilty-plea cases, with respect
17 to plus-factor cases, which clearly these are, that with all
18 due respect to our colleagues in the defense bar, now the
19 Twombly motion has become a formulaic recitation, it is the
20 shot across the bow, but I think we are not in the age of
21 John Paul Jones anymore, we can move forward, we know what
22 those defenses are, we are not saying we win the case if we
23 win the Rule 12 motion. They have defenses as to the class,
24 they have defenses as to the amount of damage, but clearly we
25 believe this complaint should be sustained. Thank you.

1 MR. CHERRY: Your Honor, can I just have one
2 minute?

3 THE COURT: Sure. Reply?

4 MR. CHERRY: Again, I mean, I guess more than any
5 of the cases we have talked about, I mean, this really just
6 does come down to two pleas relating to Toyota and what he
7 pointed to, Mr. Kohn, on paragraph 71 having two pleas for
8 Toyota. They say their defendants and their co-conspirators,
9 again, who we don't know who they are, knew and intended that
10 their actions would have a direct impact on prices sold to
11 all direct purchasers. That's not a fact, that's just an
12 assertion. You need facts to make that a reasonable
13 conclusion, and they are not in here. There are facts
14 that --

15 THE COURT: It just has to be plausible?

16 MR. CHERRY: It has to be plausible, exactly, and
17 Your Honor did point to facts in wire harnesses that Your
18 Honor determined made that a plausible. It is a leap of
19 faith and you concluded they filled in the gaps, they
20 connected the dots enough at least with these allegations
21 that the defendants controlled a highly concentrated market,
22 and actually showed an effect on prices across the board, not
23 just for the RFQ. None of that is here. There is none of
24 those facts, they are resting solely on the bald assertion.

25 Your Honor, that's exactly what Iqbal says you

1 can't do. This is identical to the -- it is very similar
2 rather to the allegation made in Iqbal that the Supreme Court
3 said that's not a fact, that's a conclusion, you have to have
4 facts to support it. And the Supreme Court has cautioned
5 courts not to send these cases into massive discovery without
6 requiring the plaintiffs to allege facts to support a claim.
7 And there are guilty pleas here, we don't deny that, but we
8 are never going to resolve whatever claims may exist
9 underlying those pleas bogging down these cases with what are
10 unfounded claims that have no connection in fact. And Your
11 Honor has raised that issue before, how are we ever going to
12 resolve this, how are we ever going to talk about settlement?
13 None of that is going to happen unless we take a reasonable
14 approach and require the plaintiffs to plead facts and start
15 trimming away this overbreadth here on these cases.

16 THE COURT: Okay. Thank you.

17 MR. CHERRY: Thank you, Your Honor.

18 THE COURT: All right.

19 MR. KOHN: Your Honor, just one very brief point?

20 THE COURT: Okay.

21 MR. KOHN: With respect to the guilty pleas we
22 would point out that it is in the paper that the Tokai Rika
23 guilty plea also included the obstruction claim --

24 THE COURT: Yes.

25 MR. KOHN: -- beyond the Toyota claim.

1 And with respect to the settlement issue,
2 apparently, at least from my friends on the indirects, they
3 are moving in that direction with these complaints.

4 THE COURT: Wait a minute. With the settlement
5 issues they are moving --

6 MR. KOHN: Mr. Victor announced to the Court that
7 there was an agreement so Mr. Cherry has just said we'll
8 never have that -- that will never occur unless these
9 complaints are struck down and apparently that's not the
10 case.

11 THE COURT: All right. The collective motion to
12 dismiss the indirect plaintiffs?

13 MS. SULLIVAN: Good afternoon, Your Honor. I have
14 a slide deck that I would like to bring up.

15 THE COURT: May I have your appearance first?

16 MS. SULLIVAN: Marguerite Sullivan from Latham &
17 Watkins on behalf of the Sumitomo defendants.

18 I will be arguing for all defendants this motion
19 to -- in opposition to -- or motion to dismiss the indirect
20 purchasers' complaint, and I will be handling the Twombly
21 argument, the Article 3 standing argument and the antitrust
22 injury argument, and then my colleague, Kelsey McPherson,
23 will present the state-specific arguments.

24 Your Honor, I'm going to focus on four aspects of
25 this case that distinguish it from the wire harness case and

1 require a different result here. The plaintiffs had
2 substantial discovery months before they filed the amended
3 complaints. That was not the case in the wire harness case.
4 The specific conduct that they allege in the complaints is
5 consistent with the conspiracy that is described in the two
6 guilty pleas that Mr. Cherry just referenced. That was not
7 the case in the wire harness complaints. The guilty pleas
8 describe conduct directed at a single auto manufacturer, that
9 was not the case in the wire harness case. And the
10 complaints do not allege that the defendants' share of the
11 HCP market suggest that an agreement among them would have
12 covered the entire market.

13 All of these differences require a different result
14 because despite plaintiffs' claim of an industry-wide global
15 heater control panel conspiracy, which is, by the way, the
16 same claim that they have made in every single one of these
17 cases, all 27 of them they make the same exact assertions,
18 the complaints in this case describe a conspiracy that
19 involved Toyota HCPs only, and that means that the complaints
20 don't satisfy Twombly and because the majority of the
21 indirect purchasers do not allege that they purchased Toyota
22 cars or HCPs they have not established Article 3 standing or
23 antitrust standing.

24 If Your Honor will turn to the second slide in the
25 packet that I sent up, this case is not the wire harness case

1 and I'm going to walk through each of these aspects a little
2 bit closer in more detail. The first is that the Court in
3 the wire harness case found that the allegations created a
4 reasonable expectation that discovery would reveal evidence
5 to support the industry-wide conspiracy that the plaintiffs
6 alleged in that complaint, and that's in your
7 indirect-purchaser order at page 13. Here, however, the
8 plaintiffs received substantial discovery before the
9 complaint was filed. They received more than 338,000 pages
10 from more than 23 custodians and many of the key documents
11 were translated. 330,000 of those pages came from Sumitomo
12 alone, and those were from 16 employees, and those documents
13 were produced seven months before plaintiffs filed their
14 amended complaints.

15 Denso produced an additional 8,000 pages from seven
16 custodians more than one month before the complaints were
17 filed, and since that time more than 50,000 additional pages
18 have been produced, so that's close to 400,000 pages from the
19 three primary alleged conspirators, more than 330,000 of
20 which were produced several months before the complaints were
21 filed. So they had significant discovery to draft their
22 complaints and yet they allege no facts at all that support
23 their allegation that the HCP conspiracy was industry wide.

24 If you look at the second box, the wire harness
25 complaints described sort of broad conclusory allegations

1 about the conduct. Here we actually have some specific
2 conduct that they have alleged, which up until this point has
3 only been filed with the Court under seal, so I'm not going
4 to refer to it in open court but I will direct the Court's
5 attention to the end-payor complaint at paragraphs 140
6 through 144, the auto-dealer complaint at paragraphs 154
7 through 157. I will note that in the end-payor complaint the
8 allegation is that certain auto manufacturers -- that the
9 conduct targeted certain manufacturers and that's not
10 accurate, we will get to that when we talk about the guilty
11 pleas, but this specific conduct that they allege in these
12 paragraphs is important because it distinguishes this case
13 from the wire harness case and also from two of the cases
14 that Your Honor relied on in the wire harness decision, In
15 re: Packaged Ice and Polyurethane Foam.

16 In In re: Packaged Ice the guilty pleas described
17 conduct targeting the southeast Michigan market. The
18 complaint, however, alleged a conspiracy that covered the
19 entire United States. The defendants filed a motion to
20 dismiss on the grounds that the complaint's allegations were
21 not plausible because the guilty plea was focused on Michigan
22 and the Court rejected that argument because there were key
23 statements from key employees in that complaint that stated
24 that the conspiracy targeted the entire United States.

25 In Polyurethane Foam the Government investigations

1 were targeting certain defendants and those allegations --
2 there were allegations in the complaint that the Government
3 investigations targeted those certain defendants, and certain
4 other defendants filed a motion to dismiss on the grounds
5 that they were not named as a target in the Government's
6 investigations. The Court rejected that argument and it
7 rejected the argument on the ground that there were multiple
8 witnesses described in the complaint that asserted that all
9 defendants were involved. So in both of those cases, both of
10 which Your Honor relied on in the wire harness decision, the
11 courts relied on additional facts outside of the guilty
12 pleas. Here there are additional facts outside of the guilty
13 pleas but they are entirely consistent with the guilty pleas,
14 they don't go beyond the scope of the guilty pleas.

15 So then if you look at the third row in the chart,
16 in the wire harness case the Court relied on the allegation
17 that guilty pleas because they were broad in part suggested
18 that the conduct was more broad than just a few OEMs. There
19 were two guilty pleas in that case in particular that are
20 particularly relevant, one was described conduct directed at
21 automobile manufacturers, plural, and the other described
22 conduct directed at certain automobile manufacturers, also
23 plural. Here, however, there are two guilty pleas and they
24 state -- one states that the conduct was directed at Toyota
25 Motor Corporation and Toyota Motor Engineering and

1 Manufacturing North America, and the other states that the
2 conduct was directed at a U.S. automobile manufacturer and
3 the employee pleas that relate to that particular defendant
4 make clear that that manufacturer was Toyota.

5 Ford's counsel earlier stated that the pleas
6 describe agreements to allocate OEM business, and Your Honor
7 asked Mr. Cherry about that, was there an agreement to
8 allocate -- you know, you take Toyota, we will take Honda?
9 That's nowhere in the pleas. The Tokai Rika plea agreement,
10 which is at Exhibit D of the defendants' reply, states very
11 clearly what the conduct was that was covered by that plea
12 and it is entirely focused on Toyota supply, Toyota bids,
13 Toyota prices. It has nothing to do with allocating business
14 among OEMs or between OEMs.

15 The Denso plea at page 6 describes the conduct for
16 that plea, and that talks about model-by-model specific
17 conduct. So there is nowhere in any of these guilty pleas
18 support for this statement that there was some type of OEM
19 allocation agreement more broad than what is in the pleas
20 themselves.

21 As Mr. Cherry also described in the
22 indirect-purchasers' complaint in this case, the plaintiffs
23 do not allege that the defendants controlled the market as
24 they did in the wire harness case. The end payors state that
25 the defendants dominated the market at page -- at paragraph

1 109 of their complaint, and the auto dealers state that a
2 handful of manufacturers supply HCPs for installation in
3 vehicles sold in the U.S. but they don't say what any
4 defendant's market share is or any facts at all that would
5 show that these particular defendants controlled the market
6 as they did in the wire harness case.

7 They also allege that the HCP market has high
8 barriers to entry and that there is interelasticity of
9 demand, but without knowing what each defendant's market
10 share is or whether there are other suppliers in the market
11 or how many other suppliers and whether those other suppliers
12 might have a significant market share, the allegations that
13 they have about high barriers to entry and interelasticity of
14 demand are meaningless. The allegations here do not suggest
15 a conspiracy that was industry wide and that's a problem
16 because they have not only failed to satisfy Twombly but also
17 because their injury claims and thus their standing depend on
18 the conspiracy being as broad as they assert that it is.
19 They want the Court to infer that the conduct affected all
20 car brands.

21 If you will turn to the next slide you can see all
22 of the different brands that they reference in their
23 complaints, however 79 of the 88 plaintiffs do not allege
24 that they purchased Toyota cars. Nine of the 40 auto dealers
25 allege that they bought Toyota cars, that's it, only nine,

1 not one of the end payors alleges that they bought a Toyota
2 car.

3 In the wire harness decision the Court stated that
4 to establish Article 3 standing plaintiffs must allege that
5 they suffered an injury that is concrete and particularized
6 and actual or imminent, and the injury must be fairly
7 traceable to the defendants' conduct. That's the causation
8 element. They haven't satisfied either here.

9 In the wire harness case we had a big discussion
10 with Your Honor about whether the indirect purchasers had
11 satisfied standing because they had sufficiently alleged the
12 traceability of an overcharge from the OEM down the chain.
13 We don't even need to get there in this case because it was
14 implicit in the Court's decision in the wire harness case
15 that the plaintiffs had actually purchased the product that
16 they plausibly alleged was price fixed, and that's not the
17 case here. Most of the plaintiffs do not allege that they
18 purchased the only product that their complaint plausibly
19 suggests was subject to a price-fixing conspiracy.

20 They also don't allege any facts that suggest that
21 prices charged to Toyota influenced prices charged for HCPs
22 to other OEMs. I expect that they will stand up and tell you
23 that that's what their theory is but they don't allege any
24 facts to support that theory whatsoever. They rely heavily
25 on Optical Disk Drive in their briefing, and in that case the

1 Court rejected an argument that plaintiffs who didn't buy
2 Dell and HP computers lacked Article 3 standing because they
3 argued -- the defendants argued that the ODDs that were sold
4 to Dell and HP were the only ones impacted by the conspiracy
5 because the conspiracy targeted Dell and HP. The Court
6 rejected that argument and there the conduct that was -- that
7 appeared in the complaint suggested that not only two OEMs,
8 Dell and HP, were targets but also that there were two others
9 that were targets.

10 Also there were allegations that Dell and HP had a
11 majority share of the ODD purchases for the personal computer
12 market and that in one year those two OEMs made up more than
13 50 percent of ODD purchases. They also allege in that
14 complaint that the transactional date demonstrated that the
15 prices of ODDs sold to Dell and HP moved in lockstep with
16 prices of ODDs sold to other OEMs, and you don't have any of
17 those allegations here. So based on the allegations in these
18 complaints it is not plausible that higher prices on Toyota's
19 HCPs influenced prices of HCPs sold to other auto
20 manufacturers.

21 For the same reasons that plaintiffs have not
22 satisfied Article 3 standing they have not sufficiently
23 alleged antitrust injury. They fail under the first factor
24 of Associated General Contractors without even getting into
25 the others. In the wire harness decision Your Honor stated

1 that in assessing whether a plaintiff suffered an antitrust
2 injury courts assess the relevant market. The court in that
3 case determined that the relevant market was the wire harness
4 market, and it concluded that even though the plaintiffs may
5 not have participated in the wire harness market they had
6 sufficiently alleged that the car market was inextricably
7 intertwined with the wire harness market such that it was
8 plausible that their purchases of cars containing wire
9 harnesses caused them an injury, but here the relevant market
10 is the Toyota HCP market, and plaintiffs that did not
11 purchase Toyota cars did not participate in any market that
12 was inextricably intertwined with the Toyota HCP market even
13 arguably.

14 The Court does not need to revisit or reverse its
15 wire harness decision to dismiss the plaintiffs' complaint
16 here. In fact, dismissing would be entirely consistent with
17 the wire harness decision because the facts and the
18 allegations that the Court relied on in that decision do not
19 appear here, and for that reason frankly not dismissing these
20 complaints would be contrary to the Court's analysis and
21 conclusions in wire harnesses.

22 Thank you, Your Honor.

23 THE COURT: Okay.

24 MS. MCPHERSON: Your Honor, Kelsey McPherson --

25 THE COURT: Are you doing the Article 3 or

1 antitrust?

2 MS. MCPHERSON: I am addressing the state claims.

3 THE COURT: The state claims. Okay.

4 MS. MCPHERSON: Good afternoon, Your Honor. My
5 name is Kelsey McPherson and I'm with the firm Latham &
6 Watkins representing the Sumitomo defendants.

7 I am here today on behalf of all the defendants in
8 the HCP case, and I would like to address just a few of the
9 remaining state claims.

10 THE COURT: Okay. So you are not repeating
11 anything, the three parts, that plaintiff --

12 MS. MCPHERSON: I am not repeating anything that
13 Ms. Sullivan --

14 THE COURT: I thought there was something else you
15 were going to add.

16 MS. MCPHERSON: No, and I know it has been a long
17 day so I plan to keep this brief and I'm going to try my best
18 to avoid duplicating the arguments that you heard earlier by
19 the IPC defendants.

20 We have selected -- I have selected a subset of
21 claims that I would like -- of state claims that I would like
22 to talk to you about today where dismissal is both necessary
23 under the case law and consistent with this Court's decision
24 in wire harness.

25 If the Court could please turn to slide four of the

1 slide set that Ms. Sullivan provided, it is the last slide.
2 I know that the state claims can get a bit unruly so we
3 boiled this down to four categories of claims that fall into
4 the subset. So this slide is the one slide I will be talking
5 about. There are four categories of claims for which
6 dismissal is both necessary under the case law and consistent
7 with this Court's decision in the wire harness case. The
8 first are state claims that should be dismissed because state
9 law bars class-action claims. This applies to the auto
10 dealers' Illinois antitrust claim and South Carolina
11 consumer-protection claim. I know this was already discussed
12 at length by the IPC defendants but I want to briefly note
13 that it applies as well to the HCP case.

14 In the wire harness case this Court dismissed the
15 Illinois antitrust claim on this basis, and while this Court
16 did not dismiss the South Carolina antitrust claim it was
17 because defendants failed to cite any post Shady Grove
18 authority. In our reply the HCP defendants cite three such
19 cases, one that directly recognized Shady Grove and, two,
20 that upheld the ban on class actions after the Shady Grove
21 decision came down. So as a result it would be consistent
22 with this Court's wire harness decision to dismiss the
23 South Carolina consumer-protection claim as well.

24 The second are state claims that should be
25 dismissed in part because they seek damages for conduct that

1 occurred before the state gave indirect purchasers the right
2 to recover for antitrust violations. This applies to the
3 auto dealer end-to-end payors Utah and New Hampshire
4 antitrust claims. In Utah and New Hampshire in 2006 and 2008
5 they both passed law retrospectively in 2006 and 2008 that
6 provided indirect purchasers with the right to recover under
7 the state antitrust laws. The indirect plaintiffs in this
8 case seek damages to the -- prior to the enactment of those
9 laws. In the wire harness case this Court refused to apply
10 these state laws retroactively. Plaintiffs in the HCP case
11 purport to cite new class law that supports their argument
12 about retroactivity. However, plaintiffs failed to cite to
13 any case in either state that actually interprets this
14 statute to apply retroactively. Rather they seem to rely on
15 a general argument that these laws are procedural or remedial
16 in nature and not substantive. They claim that these laws do
17 not create new legal consequences for antitrust violations.
18 However, plaintiffs are wrong. These amendments affect
19 defendants' substantive rights. They change the category of
20 claimants entitled to damages under the law. They create
21 significant additional legal consequences for antitrust
22 violations such as those we are here for today, laws that in
23 large substantive rights cannot be applied retroactively.

24 The third are state consumer-protection claims that
25 auto dealers cannot bring as businesses. This has been

1 discussed as well. I would just like to remind the Court as
2 well that Massachusetts and Missouri state laws explicitly
3 preclude businesses from bringing state consumer protection
4 claims and this Court recognized the impact of that on the
5 auto dealers' claim in the wire harness decision and they
6 dismissed those consumer protection claims -- this Court
7 dismissed those consumer protection claims.

8 Auto dealers in this case have brought those claims
9 again and they have also brought an additional D.C.
10 consumer-protection claim that suffers from the same fatal
11 flaw. Again, this was discussed already by IPC defendants
12 and it is possible that plaintiffs plan to drop this claim,
13 but I would like to note that the auto dealers' HCP complaint
14 suffers from the same problem. They are very clear that the
15 auto dealers bought HCPs for their repair and service
16 businesses and they sell vehicles and HCPs to customers.
17 D.C.'s consumer-protection statute protects only consumers
18 that purchase goods primarily for personal household or
19 family use. It is clear that none of these
20 consumer-protection laws are meant to apply to the purchases
21 made by auto dealers and all three should be dismissed.

22 Fourth and finally are plaintiffs' unjust
23 enrichment claims. This is the last category of documents
24 that fall into this subset that should be dismissed under the
25 existing case law including the wire harness case. There are

1 numerous grounds upon which the Court could rely to dismiss
2 plaintiffs' unjust enrichment claims and all of those are
3 discussed thoroughly in our briefing and some of which were
4 discussed early today. I would merely like to draw the
5 Court's attention to the fact that the plaintiff here, as
6 they did in the wire harness case, failed to identify the
7 unjust-enrichment laws of the particular jurisdictions under
8 which they bring their claim.

9 THE COURT: They don't raise any standards?

10 MS. MCPHERSON: They don't raise any standards,
11 exactly. It is almost verbatim the allegations brought minus
12 countable words brought in the wire harness claim, and so
13 plaintiffs' failure to plead that factual basis on a
14 state-by-state basis requires dismissal of all of their
15 unjust-enrichment claims.

16 THE COURT: Okay. Thank you.

17 MS. MCPHERSON: Thank you, Your Honor.

18 THE COURT: Response?

19 MR. WILLIAMS: Your Honor, Steve Williams again for
20 the end payors. We have decided to try to consolidate this
21 and make it a little more quick given the hour.

22 There are some truly remarkable things said during
23 that argument like the right result would be to reverse what
24 you did in the wire harness case. That's the wrong result.
25 We are here on a motion to dismiss. There was an argument

1 made or actually a quote by counsel for Sumitomo about the,
2 quote, primary alleged conspirators. They are admitted
3 conspirators, they pled guilty. And as we allege in the
4 complaint of the only four defendants we named, because we
5 only named four in this case, one is likely the applicant for
6 amnesty because they blew the whistle on the others. So we
7 are not talking about speculation if these guys were in a
8 conspiracy, we know they were, and any inferences are going
9 to be drawn there go our way and not their way. But we are
10 also here, Your Honor, in the biggest antitrust conspiracy in
11 the history of the world as far as the Department of Justice
12 is concerned. They were here earlier, they are not here now,
13 and you asked them how much more is it, how big is it, and
14 they said we can't tell you.

15 THE COURT: But he had a smirk on his face so I
16 know what he is saying.

17 MR. WILLIAMS: And we can't ask them because of the
18 stay that is in place, right?

19 THE COURT: Right.

20 MR. WILLIAMS: But the argument that these guilty
21 pleaders are making to the Court is except for all purposes
22 that the guilty pleas define the scope of the conspiracy, and
23 you have already rejected that. I said it last time I was
24 up, there is nothing new. I'm looking at your decision in
25 wire harness, there is a heading, global nature of the

1 conspiracy, and the argument is the defendants say we didn't
2 plead to what they said we pled to and therefore you should
3 pare it back, you should limit it because it is not fair to
4 us. And you said no because the law is universal, the scope
5 of a criminal guilty plea does not define the scope of a
6 civil case. It is black and white.

7 THE COURT: But one of the factors was the -- not
8 in the plea but the market-share argument, the question about
9 certain manufacturers in the plea?

10 MR. WILLIAMS: I don't think it carries much weight
11 because, see, the market-share argument is frequently in
12 complaints and most what frequently is what we call a plus
13 factor, when you don't have a guilty plea, we have now this
14 Twombly standard in every case and automatically there is a
15 motion even if you pled guilty as you now know very well you
16 still move to dismiss and say it is still not plausible as to
17 me but it is a plus factor. When you have already pled
18 guilty then I don't think it matters much what your market
19 share is, you have admitted you conspired in the market. So
20 now what we are arguing about is should we be limited by what
21 it is we put in our plea agreement or not?

22 Now, we do allege in our complaint they dominated
23 the market. I don't think we need to quibble with that
24 because, as I said, if they have already pled then we are not
25 debating did they do something wrong or not. What we are

1 talking about is what is the scope of what they did, and we
2 don't know. And, you know, they gave you their chart and
3 they said well, look, not only was the guilty plea narrow but
4 they got all of these documents from us so they should know,
5 but their guilty pleas also say they used code words and
6 covert means to hide what they did. Well, we don't have
7 their code words and their covert means, we don't know. So
8 just saying here is a dump of documents, we are not at the
9 end of discovery, we are at the beginning of the case, and
10 the problem is they are trying to circumscribe what the case
11 is about at the motion to dismiss, and that's not fair.

12 So we know we are talking right now about heating
13 control panels but we know we are talking about defendants
14 who in case after case, not just one case, case after case
15 engaged in the same conduct. And we know not only do the
16 guilty pleas not circumscribe the scope of civil liability
17 but as the courts have also found, if you conspired in one
18 market it is plausible that you conspired in a related
19 market. So really what this is down to is are the guilty
20 pleaders entitled to have you decide now and for all times
21 for this case that the scope of this conspiracy is only what
22 they pled to, or have we set forth enough to give us the
23 opportunity to determine whether or not it is broader or not.

24 THE COURT: Broader than Toyota in this case.

25 MR. WILLIAMS: Exactly, because we don't know, we

1 didn't have Ford here last time but now we do because now we
2 have heard it is broader. They don't get that inference. We
3 are entitled to an opportunity to go forward, and this is not
4 an instance where you have got someone who is way on the
5 outside saying how the heck did I end up here, I've got
6 nothing to do with Sumitomo and Yazaki or whoever they are in
7 in case because sometimes it is hard to keep them all
8 straight. It is just the four defendants, and there are
9 certainly sufficient facts in the complaint to keep them all
10 four in for purposes of plausibility. So then it is just a
11 discovery issue and then what we hear, and we hear in every
12 single case after Twombly, we are going to be subjected to
13 massive discovery if you let it go forward, it is unfair to
14 us.

15 Well, if the discovery is too much there are ways
16 to address that. There is the magistrate, and we can address
17 that, but it is the cart before the horse to say circumscribe
18 the plaintiffs' claims because then we will never get the
19 discovery and then they have essentially won a motion in
20 limine now at the motion to dismiss stage saying what's the
21 nature and scope of the conspiracy, and they are not entitled
22 to that now. There is too much smoke in the air here for
23 them to say trust us and then point the finger and blame us
24 for something on the plaintiffs' side.

25 In terms of the remaining parts of this, again, I

1 I don't think we heard anything new or different from what we
2 heard the last time we were here or from what was in the
3 papers so I'm going to sit down.

4 THE COURT: Okay. Thank you.

5 MS. ROMANENKO: Victoria Romanenko for dealership
6 plaintiffs.

7 So they said that we received discovery long before
8 we filed this complaint. 3.5 months is the amount of the
9 time between when the discovery plan in this case called for
10 defendants to make their production of some of their
11 documents to us and when we had to serve a translated
12 complaint on the defendants. And as far as Sumitomo I think
13 they said seven months. Seven months before the complaint
14 was when they produced a mix, I believe, of wire harness
15 documents and HCP documents. I don't believe that we
16 received something that was just their HCP documents until
17 October of this year. And even so, even if we had
18 everybody's documents for three and-a-half months before we
19 had to serve our translated complaint, they can't say that
20 that's enough time to review everything and synthesize every
21 possible instance of price fixing against every possible
22 affected OEM. They simply cannot logically say that they can
23 point to that fact and say for this reason they should be
24 limited to the OEM that is described in a couple of
25 illustrative examples in their complaint.

1 And, Your Honor, as we told you in our papers, the
2 ODD court didn't do that, this Court didn't do that in wire
3 harness, and we don't think that it should be done in heater
4 control panels. I think Ms. Sullivan actually covered it
5 when she described how in ODD the defendants stated well, the
6 vast majority of examples in your complaint relate to two
7 OEMs so let's limit this case; the Court didn't do that. And
8 even if there were a couple more OEMs that the complaint
9 pointed to the Court still didn't limit it to a couple of
10 OEMs, the Court let the case proceed.

11 As far as market concentration, we do allege
12 concentration of the market in our complaint.

13 THE COURT: Okay.

14 MS. ROMANENKO: One more. As far as the limited
15 nature of this case, as defendants try to put it, Mr. Gangnes
16 is correct his client, Furukawa, is not a defendant and was
17 not a defendant in instrument panel clusters, they were just
18 a defendant in wire harness with in this case Sumitomo and
19 Denso and Tokai Rika during the same time period engaging in
20 the same activity. It is plausible that they fixed prices
21 and rigged bids to multiple OEMs in that case and did so in
22 this case too. I also -- we attached this to our opposition
23 also and I will just say --

24 THE COURT: Are you saying it is plausible because
25 they did it before so they probably did it now, or it is

1 plausible that they did it then?

2 MS. ROMANENKO: They did it with regard to one
3 product so it is plausible they did it with regard to another
4 product in this very same MDL. There is nothing that they
5 can point to in our complaint that says there is a reason why
6 they would only do it with regard to one OEM for this
7 product.

8 And just on unjust enrichment I think -- I think
9 the defense stated that our claims are the same, and I'm
10 going to tell Your Honor again that our claims are not the
11 same as they were in wire harness. We clearly assert here in
12 paragraph 284 that we are bringing unjust-enrichment claims
13 under the laws of states under whose laws we are seeking
14 recovery under antitrust and consumer-protection statutes.

15 THE COURT: Okay. Thank you. Any reply?

16 MS. SULLIVAN: Just very briefly, Your Honor.

17 Your Honor, Mr. Williams stated that the plaintiffs
18 are entitled to an inference here to go forward and that's
19 true except that they have a burden at the pleading stage and
20 their burden is to allege facts that are sufficient to
21 plausibly suggest the conspiracy that they allege actually
22 happened, and they haven't met their burden.

23 The guilty pleas are relevant, that's true, but we
24 are not asking Your Honor to limit this case to the guilty
25 pleas. We are asking Your Honor to take a look at the entire

1 complaint as a whole and when you do so we believe that you
2 will see that the complaint read as a whole suggests a
3 conspiracy targeting Toyota HCPs and that's it. It does not
4 suggest a conspiracy involving all HCPs sold to all OEMs.

5 The other thing I would just want to add is that
6 Ford has not sued any of the defendants in the HCP case just
7 for the record.

8 THE COURT: Thank you. All right. Last but not
9 least, Alps.

10 MR. CUNEO: Your Honor, I wanted to --
11 Jonathan Cuneo, again, and I wanted to give you another piece
12 of good news, and that is --

13 THE COURT: You just bear good news every time you
14 come up, don't you?

15 MR. CUNEO: That the District of Columbia
16 consumer-protection claims, I speak for the dealers, we are
17 prepared to withdraw those. We stand on our briefs on
18 Massachusetts and Missouri.

19 On the retroactivity front, pages 72 and 97 of our
20 brief, it is a souped-up new argument, and on the
21 class-action bar we say that's a class-certification problem
22 at most, it isn't as if you lose your individual claim, and
23 that's what we are talking about now. So that, and on the
24 South Carolina, asked and answered by the Court.

25 Thank you.

1 THE COURT: Thank you. All right.

2 MS. MCPHERSON: Your Honor, just one additional
3 thing on the state claims. I just want to note that the one
4 additional sentence brought by end payors is not adequate
5 under this Court's ruling in wire harness to bring all of
6 their unjust-enrichment claims. And the second is that
7 the -- to remind the Court that the new souped-up argument as
8 applied to retroactivity and neither do the plaintiffs state
9 or cite any case in which these actual statutes are applied
10 retroactively.

11 Thank you.

12 THE COURT: We don't get to --

13 MS. ROMANENKO: Just very, very quickly. This is
14 obviously up to Your Honor, but I think if you look at their
15 motion to dismiss they did not seek to dismiss dealership
16 plaintiffs' claims in Massachusetts on the basis of the
17 business plaintiff rule that they stated here at oral
18 argument, so we obviously leave it up to you about how you
19 want to handle it but I don't think they raised it in their
20 motion and I don't think for that reason we responded to it
21 in our opposition.

22 THE COURT: All right.

23 MS. MCPHERSON: I apologize, Your Honor. I would
24 like to say that it was an inadvertent omission on our part
25 not to bring the Massachusetts consumer-protection argument.

1 I did bring it in my opening today to provide the defendants
2 with the opportunity to bring a new argument if they have one
3 as to why it shouldn't be dismissed, and I would respectfully
4 request the Court to dismiss that claim.

5 THE COURT: The Court will look at it. Okay. This
6 is Alps.

7 MS. STORK: Good afternoon, Your Honor.

8 Anita Stork on behalf of the Alps defendant, Alps Electric
9 Company Limited and Alps Electric North America.

10 I echo most of the previous people up here to say
11 that I will try to be as brief as possible given the hour.

12 Alps joins in all the previous motions brought by
13 the indirect purchasers -- by the defendants to dismiss both
14 indirect-purchaser complaints in the heater control panel
15 matters, but there is one additional compelling reason why
16 Alps should be dismissed and that's because plaintiffs do not
17 allege that Alps sold to Toyota, and Toyota is the only
18 manufacturer whose bids were subject to the alleged price
19 fixing. None of the end payors and, as you have heard, the
20 vast majority of auto dealers allege that they purchase from
21 Toyota, and none of them allege that Alps sold to Toyota.

22 I want to reiterate again that this is not the
23 usual case where plaintiffs have some information, file a
24 complaint and then receive discovery. There is a situation
25 where plaintiffs had the benefit of more than 338,000 pages

1 of discovery from 23 custodians, and as Mr. Williams said,
2 there is likely an amnesty applicant. So in our view this
3 failure to plead these very crucial things makes it different
4 from the ordinary case where defendants haven't had
5 discovery. Here they have had it and they should know, they
6 should be able to plead if they can plead that there is more
7 than one manufacturer that is the subject of this alleged
8 conspiracy, but they haven't, they have only alleged that
9 Toyota was the target of this price-fixing conspiracy. If
10 they had information that Alps sold to Toyota they should
11 have alleged it so this does make it very different.

12 In our view again what they haven't pleaded is very
13 important. They haven't pleaded -- they haven't alleged that
14 they purchased from Toyota, they haven't alleged that Alps
15 sold to Toyota, they haven't alleged any facts that suggest
16 that conduct directed at Toyota could have or did affect the
17 prices of HCPs sold to other OEMs. There is no allegations
18 that there were allocations between the OEM manufacturers.
19 They haven't pleaded that Alps had any economic incentive to
20 join this conspiracy. So for that additional reason we think
21 that the complaints fail as to Alps.

22 With respect to lack of Article 3 standing, we join
23 in those arguments and think that that lack of injury
24 pleaded, because only Toyota is alleged to have been the
25 target of this conspiracy and plaintiffs didn't purchase from

1 Toyota, is compounded when it comes to Alps because
2 plaintiffs again haven't even alleged that Alps sold HCPs to
3 Toyota.

4 We also think this means that plaintiffs don't have
5 antitrust standing because, as you have heard, plaintiffs
6 don't allege that they purchased a Toyota so they couldn't
7 have participated in the Toyota HCP market. Alps doesn't
8 even participate, it is not alleged to have participated in
9 the Toyota HCP market, so for these additional reasons we
10 feel that Alps should be dismissed from the complaints.

11 THE COURT: Okay. Thank you.

12 MS. STORK: Thank you, Your Honor.

13 MR. SELTZER: Good afternoon, Your Honor. I'm Marc
14 Seltzer of Susman Godfrey. I have the unenviable position of
15 going last, so I will try to be very brief.

16 Let me make two points as succinctly as I can.
17 First of all, there is no question that we plausibly alleged
18 an HCP conspiracy based upon the guilty pleas and the market
19 facts that we have alleged including facts about prices going
20 up when costs are holding steady, that's in paragraph 100 of
21 our complaint. Other market facts also support the
22 plausibility of the allegation of a conspiracy here.

23 The only question for Alps is have we alleged
24 enough to show that Alps was a participant in the conspiracy,
25 and I would invite the Court's attention particularly to

1 paragraphs 139 to 141 of our complaint where specific overt
2 acts committed by Alps and its co-conspirators are alleged in
3 detail. I can't go into that detail because the filings are
4 under seal, but those facts provide direct evidence of
5 participation of conspiracy. There is no inference that
6 needs to be drawn. That's direct evidence that is pleaded.

7 So with respect to Alps there can be no question
8 that we have satisfied any pleading standard, particularly
9 where a plaintiff in an antitrust case like this isn't
10 required to plead any overt acts by any defendant in order to
11 make out a claim that will survive a motion to dismiss in a
12 12(b)(6).

13 Now, in its pleadings or its response to our
14 arguments Alps wants to quibble about its motives. Why it
15 did --

16 THE COURT: I'm sorry, what?

17 MR. SELTZER: Alps wants to quibble about its
18 motives. It argues -- it nitpicks about the evidence of its
19 overt acts. Your Honor, the most plausible inference is that
20 Alps engaged in that conduct for its own game. That's why it
21 did what it did. That's on Alps' participation in the
22 conspiracy. It would be unheard of, I have never seen it in
23 all of my years of practice, to have a complaint dismissed
24 where overt acts are specifically alleged against an
25 antitrust defendant and the complaint is not found able to

1 sustain -- be sustained on a motion to dismiss.

2 The next point, and you heard most of the argument,
3 again is reiteration that the complaint goes beyond Toyota as
4 an OEM that was a target of the conspiracy and therefore all
5 of the other consequences flow from the fact that they say
6 this is only a Toyota-specific case. That's not our case.
7 They assume the fact to be proven and then make their
8 arguments. They assume the predicate that it is only a
9 Toyota case and then say well, in that case there is no
10 Article 3 standing, you haven't established you are in the
11 right market. All of those facts flow from that argument,
12 but that's not what we have alleged. We have alleged that
13 there was conspiracy that affected other OEMs as well. Now,
14 as Mr. Williams pointed out, do we know who they are, what
15 the circumstances were? No, that has to await discovery.
16 But the pleading that alleges that other OEMs were victims of
17 this conspiratorial conduct is certainly plausible.

18 Now, why do I say that? The defendants here had
19 multiple customers. If you -- in paragraphs 93 through 96 of
20 the complaint their customers are alleged, including ones
21 that overlap with customers of Alps, Alps' primary customers
22 are Honda and GM, that overlaps with two of the other
23 defendants who also have them as primary but not exclusive
24 customers. So the fact that they have all of these customers
25 speaks volumes to the plausibility of an inference that they

1 would have fixed prices with respect to the other customers.
2 After all, this was a ten-year conspiracy, that's what Denso
3 pleaded guilty to and that's what we have alleged. It stands
4 to reason that during that ten-year period there would have
5 been price-fixing activity with respect to other OEMs. Why
6 would they limit themselves only to Toyota, they didn't like
7 Toyota? That doesn't make any sense. So the inference goes
8 in favor of the plaintiff at this stage of the proceedings.
9 We will take discovery and we will determine what facts can
10 be sustained and the defendants will have a chance to
11 challenge our case at summary judgment or at trial, but this
12 is not the time to parse the case into pieces based upon what
13 was agreed to with the Government with its guilty pleas.

14 As Your Honor noted in your prior decisions, guilty
15 pleas are negotiated documents. They don't necessarily
16 reflect the breadth and scope of a conspiracy, it is what the
17 parties agreed to, and here they agreed to that was what
18 Denso was going to plead guilty and that's what Tokai Rika
19 was going to plead guilty to. That doesn't mean that was the
20 extent of the conspiracy. They seem to assume that has to be
21 the four corners whatever we can prove, but that's precisely
22 to the contrary of what the law is and what Your Honor ruled
23 in your June rulings in this case. So, again, their argument
24 is based upon assuming the fact to be proven and then saying
25 from that flows all of these consequences.

1 The other point I would make again as a matter of
2 law on this issue, courts have recognized that where there
3 are conspiracies affecting related products that provides a
4 basis to infer conspiratorial activity in other of the
5 related products. Judge Posner's decision in the
6 High-Fructose Corn Syrup case from the Seventh Circuit is a
7 leading case in that regard where he said it was reasonable
8 to infer a conspiracy in High Fructose Corn Syrup based upon
9 admitted conspiracies involving lysine and citric acid. How
10 much more plausible is it to infer conspiracy with respect
11 not to a related product but to the same product with
12 customers that are overlapping customers of these
13 co-conspirators, two of whom have pled guilty and one
14 additional party is likely to be an admitted conspirator as
15 part of the Ex Pari process for the Department of Justice.

16 So, Your Honor, the allegations are plausible, a
17 motion to dismiss is not the time to cut the case down
18 without an evidentiary basis, and the allegations meet the
19 standard of Twombly and Iqbal at this juncture of the case.

20 The last thing I would say, Your Honor, on the
21 discovery issue, we've got no discovery from Alps, none,
22 zero. Discovery is just beginning in this part of the case
23 so to suggest that this ought to be looked at as if we were
24 at the end of the road on discovery that completely
25 mischaracterizes the procedural posture of this case.

1 Unless Your Honor has any questions I have made the
2 points. Thank you, Your Honor.

3 MS. STORK: Just one minute to quickly respond to a
4 few of Mr. Seltzer's points. One, it is certainly our
5 contention that if the Court takes a look at the paragraphs
6 that they were directed to look at that labeling Alps'
7 conduct as overt acts is a label and it is conclusory.
8 Plaintiffs have not alleged any facts that Alps had an
9 economic incentive to join into this conspiracy.

10 And finally they are just asking the Court to take
11 their conclusory word for it that other OEMs were affected.
12 They have had hundreds of thousands of pages of documents and
13 they still have not plausibly alleged anything beyond Toyota
14 and 12(b)(6) is all about facts and not conclusions.

15 Thank you, Your Honor.

16 THE COURT: Thank you. Okay. The Court will issue
17 opinions on all of these. Is there anything else?

18 (No response.)

19 THE COURT: No. All right. Thank you for coming
20 in. We will see you in February. Happy holidays.

21 THE LAW CLERK: All rise. Court is adjourned.

22 (Proceedings concluded at 4:35 p.m.)

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CERTIFICATION

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3 I, Robert L. Smith, Official Court Reporter of
4 the United States District Court, Eastern District of
5 Michigan, appointed pursuant to the provisions of Title 28,
6 United States Code, Section 753, do hereby certify that the
7 foregoing pages comprise a full, true and correct transcript
8 taken in the matter of In re: Autmotive Parts Antitrust
9 Litigation, Case No. 12-md-02311, on Wednesday,
10 November 13, 2013.

11

12

13

s/Robert L. Smith

14 Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
15 Eastern District of Michigan

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Date: 12/02/2013

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Detroit, Michigan

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